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# The role of competition policy in promoting sustainable and inclusive growth

## Note by the UNCTAD secretariat

*Executive summary*

Competition enhances efficiency, promotes innovation and leads to wider product choice and better quality, thereby improving consumer welfare. Competition policy may play a significant role in achieving sustainable and inclusive growth and development. This note looks into how competition policy and law could foster such goals.

Competition policy, if appropriately designed and effectively implemented according to the economic, social and environmental circumstances in a country, is expected to complement other government policies in achieving sustainable and inclusive growth and development. For this purpose, prioritization of those sectors that are most crucial to the people and economy of a country is important. Exemption of certain agreements and practices in agriculture, such as farmers' cooperatives, may improve smallholder producers' efficiency and income, thereby enhancing their standards of living. Another significant factor in policy design is to consider both free and fair competition as two pillars of competition policy. Effective competition law enforcement and advocacy play a key role in realizing sustainable and inclusive development through the elimination and deterrence of anticompetitive practices. Further, applying exemptions to business agreements that promote economic progress, environmental protection and green technologies and products from competition law enforcement are necessary to advancing sustainable development goals.

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# I. Introduction

1. It is widely accepted that a nation's development cannot be achieved solely by gross domestic product growth, but instead can only be achieved by a comprehensive and integrated agenda of environmental, social and economic policies and instruments. By identifying the linkages, complementarities and frictions between these three policy areas, growth may be achieved in the long term that is both inclusive and equitable and also environmentally responsible. This issue is neatly laid out in the Synthesis Report of the Secretary-General on the post-2015 sustainable development agenda, as follows:[1]

> Sustainable development must be an integrated agenda for economic, environmental and social solutions. Its strength lies in the interweaving of its dimensions. This integration provides the basis for economic models that benefit people and the environment; for environmental solutions that contribute to progress; for social approaches that add to economic dynamism and allow for the preservation and sustainable use of the environmental common; and for reinforcing human rights, equality and sustainability. Responding to all goals as a cohesive and integrated whole will be critical to ensuring the transformations needed at scale.

2. Member States of the United Nations have been negotiating the contents of the post-2015 sustainable development agenda since January 2015 under the auspices of the United Nations General Assembly. The post-2015 agenda is expected to be transformative, that is, it should transform economies, societies and the ways to tackle climate change with a view to making "patterns of growth more inclusive, sustained and sustainable".[2] These intergovernmental negotiations are expected to conclude by the end of July 2015 and to present a set of sustainable development goals and means of implementation necessary for achieving them. In this framework, at the national level, Governments will need to integrate these goals into their policies and laws and take measures towards achieving them. This note explores the role of competition law and policy within this integrated approach.

3. One of the fundamental aims of competition policy and law is to increase competitive market pressures. When these pressures are lacking in markets, especially in the presence of monopolies and cartels, higher prices, lower quality products and economic injustice will prevail.[3] This may have particularly strong effects on the poorest or most vulnerable consumers if these markets are tasked with the provision of basic goods.

4. By correcting market failures, effective competition policies may lead firms to become more efficient, increase innovation and widen consumer choice and product quality.[4] Further, as outlined in one study, these conditions may also lead to firms producing healthier, safer, environmentally responsible and more ethical and equitable products, in order to satisfy the demands of more discerning and conscientious consumers.[5] Proponents of competition policy would argue that, as well as fostering economic growth, this is indicative of its role in supporting equitable outcomes, alleviating poverty and indirectly promoting sustainable and inclusive development. Further, the alignment of

[1] A/69/700.
[2] Ibid.
[3] TD/B/C.I/CLP/24/Rev.1.
[4] TD/B/C.I/CLP/27.
[5] MW Gehring, 2003, *Sustainable Competition Law*, presented at the fifth session of the Ministerial Conference of the World Trade Organization, Cancun, Mexico, 10–14 September.

business practices, especially those of big business, can play a central role in determining the development path of a nation.[6]

5. One study suggests that sustainable competition law must address social and environmental concerns and cannot focus solely on economic issues.[7] Further, in order to use competition law to promote sustainable and inclusive development, the study emphasizes the need for the identification of appropriate environment and development objectives, their links to international competition rules and the appropriate mechanisms in relation to the specific context of the affected country.

6. Another study highlights the similarities of environmental and competition policies in identifying and correcting market failures, although the former target environmental externalities and the latter increased economic performance.[8] For example, if an economy and the majority of its stakeholders are to truly benefit from the market economy and a liberalization of trade, certain redistribution mechanisms must be imposed on the market. Similarly, in order to promote an environmental agenda, similar mechanisms will be used. With obvious implications for the holistic approach to sustainable and inclusive policies, the paper emphasizes that although they share similarities, the tools used to enforce and enact environmental policy may directly oppose competition policy.

7. In this respect, another study outlines the importance of good governance, and particularly openness, accountability and monitoring, if competition policy enforcement is to be successfully coupled with effective environmental management.[9]

8. An examination conducted by the Nordic Competition Agencies on the linkages between environmental and competition policies emphasizes the importance of effective competition for environmental growth strategies, as efficient price determination and signals enable effective abatement policies and technological innovation to be implemented.[10] Further, as effective competition is a key factor to innovation within markets, it also influences the ability of markets to achieve environment targets in an efficient and cost-effective manner. Therefore, it is the interaction between these two policies that lead to the optimal achievement of environmental goals.

9. While there seems to be a compelling need for interactive, holistic policies, only a few jurisdictions have competition objectives related to sustainable and inclusive development. As highlighted by one study, the Republic of Korea Fair Trade Commission is tasked with promoting balanced development through the use of competition tools, avoiding concentrations of market power and encouraging open and equitable competition.[11] Another study highlights that South Africa and Spain are among the few countries that specifically include substantive provisions to promote social development and environmental protection, respectively, within their competition laws. The Spanish law lists these factors as reasonable bases for overturning a decision made by competition

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[6] A Chandler, 1990, *Scale and Scope: the Dynamics of Industrial Capitalism*, Cambridge, United States of America: Harvard University Press and A Chandler, F Amatori and T Hikino, eds., 1997, *Big Business and the Wealth of Nations*, Cambridge, Cambridge University Press.

[7] MW Gehring, 2006, Competition for sustainability: sustainable development concerns, in National and European Commission Competition Law, *Review of European Community and International Environmental Law*, 15(2)172–184.

[8] H Pacini, M Diaz and M Dolores, G Valéria and I Benohr, 2013, Environmental and Competitive Performances: An Exploratory Note, *World Competition*, 36(3): 409–424.

[9] Gehring, 2003.

[10] M Virtanen et al., 2010, *Competition Policy and Green Growth: Interactions and challenges*, Report from the Nordic competition authorities, available at http://www.kapping.fo/get.file?ID=9578.

[11] M Wise, 2000, The role of competition policy in regulatory reform: Review of competition law and policy in [the Republic of] Korea, OECD Journal of Competition Law and Policy, 3(2):128–80.

authorities.[12] In South Africa, the integration of competition and social policies in the post-apartheid era was seen as vital for the economic participation of black-owned companies, especially given the prevalence in the economy of a small number of highly dominant firms.[13]

10. At the regional level, one study notes the importance to the current European Union legislative process of environmental and social criteria for government procurement processes.[14] While recognizing the need for increased cooperation across member States of the European Union on these issues, the paper demonstrates the potential for conflict between economic, social and environmental policies by calling on competition authorities to define limits for these criteria insofar as they may contravene Article 101 of the Treaty on the Functioning of the European Union.

## II. How competition policy can contribute to sustainable and inclusive growth and development

11. Sustainable and inclusive development is the core concept underlying the post-2015 sustainable development agenda and includes the idea of economic transformation. Appropriate industrial and trade policies are definitely necessary but not sufficient on their own to achieve sustainable and inclusive growth and development. Competition policy should complement these policies if Governments are to achieve such development. Why does competition policy matter? Competition enhances efficiency, promotes innovation and leads to wider product choice and better quality, thereby improving consumer welfare. It also disciplines the behaviour of firms. Lack of competitive rivalry may result in dominant firms seeking to maintain or obtain monopoly rents, which go against the idea of sustainable and inclusive growth and let firms make unfair profits at the expense of consumers and potential competitors. High and anticompetitive profit markups have been found to prevent growth, productivity and employment creation.[15]

12. The case of the steel and chemicals industries in South Africa as illustrated in one study shows this clearly.[16] These industries had been highly concentrated industries composed of national champions that had faced no domestic competitive pressure during the apartheid regime. While they had been among the best performing manufacturing sectors in the country, they failed to supply competitively priced intermediate inputs to downstream industries. The lack of domestic competition in the steel and chemicals industries prevented the establishment of links between the former and the downstream industries in a way that contributed to overall industrial and economic growth and the development of the country.

13. This subsection considers ways in which competition policy and law may contribute to achieving sustainable and inclusive growth and development.

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[12] Gehring, 2006.

[13] S Roberts, 2004, The role for competition policy in economic development: the South African experience, *Development Southern Africa*, 21(1).

[14] T Lübbig, 2013, Sustainable Development and Competition Policy, *Journal of European Competition Law and Practice*, 4(1).

[15] S Roberts, 2010, Competition policy, competitive rivalry and a developmental state in South Africa, in O Edigheji, ed., *Constructing a Democratic Development State in South Africa: Potentials and Challenges*, Human Sciences Research Council Press, Pretoria.

[16] S Roberts, 2007, Patterns of industrial performance in South Africa in the first decade of democracy: The continued influence of mineral-based activities, *Transformation*, 65:4–34.

## A. Development of a sound competition policy

14. Achieving sustainable and inclusive growth and development requires a good policy mix that needs to take into consideration the specific economic, social and environmental circumstances of a country. In order to contribute to sustainable development, which encompasses economic, social and environmental dimensions of development processes, such a policy mix would include trade, economic, social and environmental policies. If designed appropriately and implemented effectively, competition policy is another tool that complements these policies in attaining sustainable and inclusive growth.

15. It is important to identify how competition policy may best contribute to sustainable and inclusive development. For this purpose, the process of developing a competition policy should be participatory and engage all stakeholders, including relevant government ministries and other institutions, consumer and business representatives, academia and civil society. This will facilitate policy design that addresses the concerns raised by stakeholders to the extent possible. Having said that, it should be noted that competition policy may address other policy objectives indirectly and to the extent possible.

### Prioritization

16. One of the ways in which competition policy can contribute to sustainable and inclusive development is to set priority sectors that are essential for an economy and for poor people. This would allow the competition agency to focus its resources on dealing with possible anticompetitive practices in these priority sectors. For instance, if the policy defines agriculture as a priority sector, this may contribute to the elimination of anticompetitive practices in that sector, thereby ensuring fair prices for consumers and producers, which would then improve their living standards.

17. Further, prioritizing the agricultural sector in competition policy and consequently in competition law enforcement would promote sustainable development. Considering that the majority of the poor in developing and least developed countries live in rural areas and earn their living from agriculture, this may eventually contribute to poverty reduction by enhancing small farmers' productivity and income growth. Effective competition policies might result in better access by small farmers to agricultural inputs such as fertilizers, seeds and agrochemicals. Similarly, competitive downstream markets could help domestic value addition for agricultural commodities.

### Exemptions: The agricultural sector

18. Agriculture is a sector that is often subject to special treatment by competition laws and other sectorial laws due to its multi-dimensional nature. Agriculture involves economic activities that have both social and environmental dimensions. It provides livelihood for an important segment of the population in both the developed and developing world. In addition, the weaker bargaining power of smallholder farmers vis-à-vis providers of inputs such as fertilizers and agrochemicals, as well as buyers of their produce, requires special attention in competition policy. To eliminate such an imbalance, farmers organize themselves in cooperatives, which may facilitate collecting, processing and marketing of their products; negotiate prices with buyers on their behalf; enable them to purchase inputs at lower prices; and provide them with access to credit and other financial services. An UNCTAD study on Mexico's agricultural development, which includes an analysis of competition issues in corn production and commercialization in Mexico, recommends the strengthening of existing associations or cooperatives of small corn growers and supporting the establishment of new associations and cooperatives in order to deal with imbalanced

bargaining power vis-à-vis buyers, as well as unequal competition vis-à-vis large corn farms.[17]

19. Many jurisdictions' competition and agriculture laws and regulations include derogations from the application of competition rules to the agricultural sector. In the European Union, competition rules apply to the entire food supply chain, from agricultural production to grocery retail. Competition rules for agricultural products are laid down in Regulation 1308/2013, which is known as the Common Market Organization Regulation and provides for some exemptions.[18] These exemptions allow for cooperation agreements among farmers which aim at increasing efficiency and strengthening the bargaining power of farmers vis-à-vis buyers on the condition that they do not exclude competition, do not impair the objectives of the Common Agricultural Policy or do not engage in price fixing. Exemptions also cover vertical agreements between farmers on one hand and processors and wholesalers on the other, subject to certain conditions. Following the 2013 Common Agricultural Policy reform, new competition rules for the agricultural sector were introduced. These rules allow producers of olive oil, beef and veal and arable crops to jointly sell/commercialize their products through producer organizations subject to certain conditions, including increased efficiency in production and certain thresholds for the volumes marketed by these organizations.[19]

20. The United States of America has a similar exemption for the agricultural sector. The Clayton Antitrust Act of 1916 authorizes farmers to set up cooperatives "for the purpose of mutual help".[20] The Capper-Volstead Act of 1922[21] clarifies the mutual help to be extended to farmers through cooperatives and the legitimate objectives of such cooperatives, as "collectively processing, preparing for market, handling and marketing" the agricultural products of its members for their mutual benefit.[22] However, farmers cooperatives are not immune from the application of competition law where these organizations engage in anticompetitive activities to the detriment of consumers.

21. Some countries, such as France and Sweden, have explicit provisions in their competition laws exempting agricultural cooperatives or associations from the prohibition under their competition laws, whereas many developing countries do not have such explicit exemption provisions in their competition laws for any specific sector.[23]

**Complementarity**

22. Competition policy is an essential policy and complements other government policies in achieving sustainable and inclusive growth and development. On the environmental dimension of sustainable development, no one would deny the need for research and development, eco-innovation and eco-friendly technologies. Competition policy may be designed so as to promote such businesses while environmental policy may provide incentives to eco-friendly production processes, green sectors and products. However, such policies or incentives should neither be used as disguised protectionism nor

[17] UNCTAD, 2014, *Mexico's Agricultural Development: Perspectives and Outlook* (New York and Geneva, United Nations publication).

[18] See http://ec.europa.eu/competition/sectors/agriculture/overview_en.html.

[19] Ibid.

[20] § 6 Clayton Act, 15 U.S.C. §17, available at http://gwclc.com/Library/America/USA/The%20Clayton%20Act.pdf.

[21] Capper-Volstead Act, 1922, 7 U.S.C. §291.

[22] A Reich, 2006, The Agricultural Exemption in Antitrust Law: A Comparative Look at the Political Economy of Market Regulation, and A Reich, 2007, Bar Ilan University Pub. Law Working Paper No. 06-7, Texas International Law Journal, 42(843), available at http://ssrn.com/abstract=944389.

[23] Article 4 of Chapter 2 of the Swedish Competition Act of 2008 and paragraph I.2 of Article L420-4 of the Commercial Code of France.

to unnecessarily distort competition in the market. One objective of competition policy is to ensure efficient and well-functioning markets, which are crucial in promoting innovation and new technologies. Therefore, it is recognized by some countries that efficient environmental policy requires strong competition policy implementation, which does not allow firms to abuse their market power or exclude competition in order to stimulate more innovation; does not approve anticompetitive mergers for the sake of innovation; and at the same time does not discourage horizontal or vertical cooperation between firms to engage in joint research and development and eco-innovation activities.[24]

23. In South Africa, competition policy was part of the reforms undertaken both to address the historical economic structure, where corporate ownership and control was highly concentrated, and to promote inclusive growth. Competition policy was considered important for improving the participation of black-owned companies in the economy.[25] The importance of competition was also highlighted in the Government's Accelerated and Shared Growth Initiative for South Africa.[26]

24. Further, the provisions on the criteria used to grant exemptions to certain business agreements or practices in the South African competition law reflect the complementarity of competition policy and industrial policy. Section 10(3)(b) of the Competition Act 1989 provides that an exemption shall be granted if the agreement or practice concerned contributes to: (i) maintenance or promotion of exports; (ii) promotion of the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive; (iii) change in productive capacity necessary to stop decline in an industry; or (iv) the economic stability of any industry designated by the minister, after consulting the minister responsible for that industry.

25. Similarly, competition policy was complementary to industrial policy in Japan and the Republic of Korea during their economic growth and development. In Japan and the Republic of Korea, competition law enforcement and competition institutions were closely linked to national industrial policy. The Republic of Korea Fair Trade Commission had close ties with the Economic Planning Board, of which it was a member until 1994.[27] Further, rivalry between firms was an important national strategy and was encouraged to achieve industrial development goals. This strategy had a substantial impact on the investment and production decisions of firms. Dynamic competition processes played a disciplining role and a role in promoting the competitiveness of large corporate groups in the Republic of Korea.[28] This shows the importance of competition policy in achieving the structural economic transformation needed to achieve sustainable development.[29]

**Fair competition**

26. Besides ensuring free competition, competition policy may also look into ways to strengthen fair competition. Competition laws aim to remedy anticompetitive practices but not necessarily unfair business practices. This is so especially with respect to contractual relationships between small and medium-sized enterprises (SMEs) and large businesses.

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[24] KE Johansen, 2008, Director General, Norwegian Competition Authority, *Sustainable Development and Competition Policy*, Presentation at the European Competition Day, Paris, 18–19 November, available at http://www.konkurransetilsynet.no/ImageVaultFiles/id_1460/cf_5/Sustainable_Development_and_Competition_Policy.pdf.

[25] S Roberts, 2004, The role for competition policy in economic development: the South African experience, Working Paper 8, Trade and Industrial Policy Strategies, available at http://crdi.ca/EN/Documents/The-Role-of-Competition-Policy-in-Economic-Development.pdf.

[26] S Roberts, 2010.

[27] S Roberts, 2004.

[28] Ibid.

[29] A/69/700.

The former may be vulnerable vis-à-vis the latter given the superior bargaining power of large businesses.

27. In an increasingly globalized world economy, developing countries and countries with economies in transition face many challenges. Production in many sectors is carried out through global value chains dominated by large multinational companies, their subsidiaries and subcontractors. Global value chains have been experiencing increased concentration through both horizontal and vertical mergers of large transnational corporations, or through takeovers by transnational corporations of smaller domestic companies. In these highly concentrated and vertically integrated global manufacturing sectors, local SMEs face the challenge of dealing with very large enterprises with strong bargaining power. Local SMEs do not have sufficient bargaining power and are therefore in a disadvantaged position to negotiate fair prices or contract terms and conditions for their products or services in vertical relationships with large firms.

28. Given that key exporters and their suppliers in global value chains are often transnational corporations, there are concerns that value added created by foreign affiliates in developing countries does not confer the same economic benefits as the value added created by local firms. This is because foreign affiliates may repatriate their earnings on the value added. Nearly two thirds of global foreign direct investment income was repatriated while one third was retained in host economies.[30] To some extent, the share may vary according to the type of global value chain involvement of foreign affiliates in host countries. Considering this, developing countries might want to protect their local SMEs from the abuse of bargaining power by big businesses. Competition policy may address this issue by focusing not only on free but also on fair competition and develop solutions for how to protect SMEs from the abuse of superior bargaining power by large domestic and transnational enterprises in such unbalanced relationships. This is very important for the fair sharing of benefits from globalization and realizing sustainable and inclusive growth and development.

29. Competition law and unfair competition law constitute two pillars of competition policy. Both are concerned with the protection of competition and may therefore be considered as part of basic competition legislation. Even though competition and unfair competition laws emphasize different aspects, that is, free and fair competition, respectively, their common feature is to promote competition. Competition can only function properly if it is free from distortion resulting not only from market failures but also from unfair business practices.

30. Abuse of bargaining power cannot be addressed by competition laws as it is different from abuse of market power. Abuse of bargaining power refers to a situation in which a party takes advantage of its superior bargaining position vis-à-vis another party and engages in unjust conduct compared to normal business practices, through acts including but not limited to: (1) setting or changing transaction terms in a way disadvantageous to the other party; (2) imposing a disadvantage on the other party regarding terms or the execution of transaction; (3) unfair and unduly long payment terms for supplied goods or services; (4) unfair and unjustified provisions concerning the return of goods; and (5) unfair discrimination.

31. In competition law, the abuse of dominant position requires a firm to have significant market power in the relevant market. This is a necessary but not sufficient condition to prove abuse. Different from abuse of dominance, abuse of bargaining power does not require a party to have a dominant position in the market, but it does require that it

[30] UNCTAD, 2013, *World Investment Report 2013* (New York and Geneva, United Nations publication).

have a superior bargaining position compared to the other party in a business relationship. According to a report by the International Competition Network, the criteria used by some countries to assess the abuse of a superior bargaining position include: (1) degree of trade dependence on the firm by the other; (2) probability of finding an alternative trade partner; (3) supply and demand forces of the product or service; (4) difference in scale of business between the parties; and (5) position of the abusing firm in the industry.[31] In terms of the market effect, if the requirements of position and conduct are satisfied, the relevant conduct violates the provision on abuse of superior bargaining position, tending to impede fair competition, rather than restraining competition in a specific market.

32. Due to the different criteria applied to assess cases of abuse of dominance and abuse of bargaining power in most cases, standard provisions in competition law fall short of addressing this issue. Therefore, an additional regulation or law that focuses on fair competition is indispensable, unless such situations are addressed by specific provisions under competition law. Fair competition would contribute towards inclusive growth and development by improving business conditions for SMEs and ensuring their fair participation in the economy.

## B. Design of competition law

33. Competition law may be designed and implemented in such a way as to promote inclusive and sustainable growth and development. There are many interesting examples from various countries that address specific economic, social and historical issues through the appropriate design and effective implementation of competition law.

### Fairness of competition

34. In countries where economic power is highly concentrated in the hands of a few corporate groups, competition law may promote the participation of underprivileged economic agents in the process of competition on one hand and establish the rules of fair and free competition on the other.[32] Japan and the Republic of Korea addressed this issue by including fair competition provisions in their laws and practices to protect the interests of smaller firms, especially in their subcontracting relationships with big businesses. In the Republic of Korea, the Monopoly Regulation and Fair Trade Act addresses imbalances in the bargaining power between parties by prohibiting "trading by unjustly using a superior bargaining position" (Article 23(1)4). In addition, the Republic of Korea Fair Trade Commission aims to ensure the fairness of transactions between large companies and SMEs by enforcing the Fair Transactions in Subcontracting Act, which has been in force since 1984. In this framework, the Republic of Korea Fair Trade Commission provides advice and assistance to SMEs in avoiding subcontracts with unfair commercial terms.

35. It is not only SMEs that may suffer from the superior bargaining power of large firms they deal with. A similar problem is faced by smallholder farmers in both developed and developing countries. This issue may be addressed by allowing farmers to organize themselves in cooperatives. Another approach might be to formulate specific provisions in competition law to deal with the abuse of buyer power. For this purpose, competition law must first of all include the protection of competition as an open process among its objectives. The conventional objective of protecting consumer welfare or interests might not be sufficient to justify any measure against the abuse of buyer power, which adversely

[31] International Competition Network, 2008, Report on abuse of superior bargaining position, available at http://www.internationalcompetitionnetwork.org/uploads/library/doc386.pdf (accessed 30 March 2015).

[32] S Roberts, 2010.

affects small agricultural producers but does not necessarily cause consumer harm.[33] In addition, for competition authorities to be able to prosecute the abuse of buyer power, competition law needs to prohibit the abuse of buyer power and provide criteria, similar to those for the abuse of dominance, on how to establish buyer power and assess whether there is abuse of such power.

36. However, it should be noted that cases that deal with the abuse of market power are very difficult to prove in practice. Therefore, remedying the abuse of buyer power by competition law should not be seen as the sole and best option. Other policies and mechanisms to eliminate such distortions and provide support to smallholder farmers should be put in place.

**Public interest**

37. Some competition laws include public interest provisions in sections on the objective of the law, exemptions and merger control. Such provisions give a certain degree of flexibility to the adjudicative body in evaluating the effect of the practice in question not only on competition but also on issues such as employment, the impact on the competitiveness of SMEs and market access and citizen empowerment. The Republic of Korea Monopoly Regulation and Fair Trade Act has "balanced economic development" among its objectives. The South African Competition Act states that its purpose is to promote and maintain competition in the country in order to promote economic development and employment; to advance the social and economic welfare of South Africans; to ensure that SMEs have an equitable opportunity to participate in the economy; and to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.[34] The last two objectives give the South African competition institutions a role to play towards achieving inclusive growth and development. Similarly, the Anti-Monopoly Law of China provides in Article 1 that one of the objectives of the law is to safeguard social public interest.

38. The competition laws of Botswana, China, Hungary, Namibia, Poland, South Africa and Zambia include public interest criteria in assessing the competitive impact of mergers.[35] Nevertheless, these public interest provisions are usually only secondary to the economic efficiency and competition impact analysis by authorities.

**Exemptions**

39. Many competition laws include exemptions to prohibited anticompetitive practices. These exemptions may be of a sectorial or non-sectorial nature. Section A of this note discusses agriculture as a sector that is subject to special treatment by competition and sectorial laws and regulations. Non-sectorial exemptions under competition law are granted to business agreements or practices, which would have the effect of ensuring economic progress, including the creation or retention of jobs, and would allow consumers a fair share of the resulting benefit, without giving businesses concerned the possibility of eliminating competition in a substantial part of the products market.[36]

40. The European Union provides for such an exemption from the prohibitions listed in Article 101(1) of the Treaty on the Functioning of the European Union. It provides that prohibitions in the latter do not apply to any agreement between firms "which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does

[33] UNCTAD, 2014.
[34] Article 2 of Chapter 1 of the Competition Act No. 89 of 1998 of South Africa.
[35] TD/RBP/CONF.8/L.3.
[36] TD/RBP/CONF.8/L.2.

not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question".[37] This exemption may apply to agreements in research and development that might result in innovation supporting environmental protection or agreements to promote the production and distribution of green products.

41. It may be argued that the way in which exemptions set out in competition law are interpreted and applied may also result in the prevention of agreements that would otherwise contribute to achieving sustainable development through better use of natural resources or environmental protection. This is because the balancing of possible consumer welfare loss resulting from such agreements on one hand and sustainable development gains to be achieved on the other might not be a straightforward exercise.[38] Therefore, authorizations and exemptions under competition law may be formulated and implemented in such a way as to provide for evaluating business agreements or practices with respect to their impact on sustainable development, including environmental protection, promoting ecological innovations or the production and distribution of green products, etc. This might require the substantial integration of social and environmental dimensions of sustainable development into competition law and a sustainable development perspective into the way the law is enforced.

## C. Competition law enforcement and advocacy

42. Efficient and effective competition law enforcement deters, eliminates and sanctions anticompetitive practices in the market. This would promote competitive markets and enhance consumer welfare, since anticompetitive practices result in higher prices, lower quality and lesser choice for consumers. However, it is recognized that competition authorities, especially those in developing countries, have limited resources. Therefore, they need to use their resources in the most efficient way. Prioritization might be a good way to allocate resources efficiently.

43. Competition authorities may identify priority areas for enforcement based on their implications for sustainable and inclusive growth and development. Some competition authorities have set up a framework for enforcement prioritization. South Africa is a good example. In 2008, the South African Competition Commission identified prioritization criteria as part of its strategic planning process. One of these criteria is the impact on poor consumers. The Commission identified the following four priority sectors based on these criteria: food and agroprocessing; infrastructure and construction; banking; and intermediate industrial products. Similarly, the Competition Authority of Kenya aims to ensure access by poor people to basic goods and services at affordable prices. In the Republic of Korea, in response to threatening inflation in the aftermath of the global economic crisis, the Republic of Korea Fair Trade Commission set up a programme to monitor price fixing of key items, price hikes of which can severely impact households. Through this initiative, a number of cartels in instant noodles, eggs and gasoline markets were detected. Other competition authorities, such as those in Indonesia and Mauritius, focus their enforcement activities on sectors that provide the basic needs of people.[39]

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[37] Article 101 para. 3 of the Treaty on the Functioning of the European Union.

[38] A Gerbrandy, 2013, Competition law and sustainable development: An inquiry by legal essay, in ALBC Ciacchi, MA Heldeweg, BMJ van der Meulen and AR Neerhof, eds., *Law and Governance: Beyond the Public-Private Law Divide*, Eleven International Publishing, The Hague.

[39] TD/B/C.I/CLP/24/Rev.1.

44. In countries where agriculture plays an important role in the economy and in the lives of the poor population, the agricultural sector might be set as a priority sector for competition law enforcement. The sector often faces highly concentrated upstream and downstream segments of the supply chain. This has a substantial impact on smallholder farmers and the poor population, especially in developing and least developed countries whose revenues depend heavily on export crops, such as coffee, cotton, cocoa and tobacco. The downstream segment is characterized by the existence of only a few dominant firms that buy from smallholder farmers, thereby determining the farm-gate prices of such crops due to their oligopsony power. A World Bank study examines how the internal structure of export markets and the level of competition affect poverty and welfare in remote rural areas in Africa.[40] The study focuses on coffee, cotton, cocoa and tobacco in eight countries, namely Benin, Burkina Faso, Côte d'Ivoire, Ghana, Malawi, Rwanda, Uganda and Zambia. These crops are a major source of export revenue for these countries and are produced mostly by smallholder farmers. Therefore, the change in export prices of these commodities may play a significant role in improving farmers' livelihoods. The study concludes that more competition among processing and exporting firms is beneficial for smallholders. Further, it is observed that more competition boosts the positive effect of complementary policies, which aim to improve services and infrastructure affecting farmers and firms in the sector. This shows the importance of complementary and coherent policies in achieving sustainable and inclusive development goals.

45. The agricultural sector is also prone to anticompetitive practices in upstream markets for inputs such as fertilizers, seeds distribution and agrochemicals. These markets are globally highly concentrated in the hands of a few multinational firms. In the downstream market, there is a trend of consolidation of retailers on a global scale, which results in highly concentrated distribution and retail networks for agricultural products. Competition law enforcement and advocacy might play an important role in dealing with anticompetitive practices in these segments. Further, the less competitive nature of these oligopolistic markets may negatively affect agricultural producers and consumers, even in the absence of anticompetitive practices. Merger control regimes can be an effective tool to prevent the further consolidation of businesses in already highly concentrated input and processing markets. Further, any collusive practice or abuse of market power in these markets may be dealt with under the relevant provisions of competition law. An additional way to deal with this situation may be through additional regulations or policies that promote competition and new entry in distribution and retail markets.

46. Competition authorities may also use their advocacy power to support the design of pro-competitive State aid schemes in the agricultural sector. The UNCTAD study on Mexico's agricultural development, which focuses on competition issues in corn production and commercialization in Mexico, determined that the design of agricultural subsidy schemes favoured large corn farms compared to smallholder corn producers and therefore distorted competition to the detriment of the latter.[41] The study recommends putting in place pro-competitive State aid schemes, which would enable small corn producers to grow and compete successfully in commercial markets.

47. One of the challenges facing competition authorities in developing countries is that many multinational companies, including those in the agricultural sector, whose operations affect their markets, are from outside their jurisdictions. Therefore, one way to tackle this

[40] G Porto, ND Chauvin and M Olarreaga, 2011. *Supply Chains in Export Agriculture, Competition and Poverty in Sub-Saharan Africa*, Centre for Economic Policy Research and World Bank.

[41] UNCTAD, 2014.

extraterritoriality issue may be to consider the application of regional competition rules, such as in the European Union and the Common Market for Eastern and Southern Africa.[42]

48. Prioritization by competition authorities should be coherent with other government policies and should be informed by other relevant government institutions, particularly those responsible for economic, trade and social policies, including employment, health, education, youth, gender and minorities and environment policy, if it is to contribute to sustainable and inclusive growth and development.

49. Another way in which competition authorities may contribute to sustainable and inclusive development is by influencing policymaking through competition advocacy. Competition authorities should cooperate with other government bodies to ensure that regulations or policies do not violate competition principles in a way that would impede the achievement of sustainable development.

50. The example of environment policy may be considered. One of the goals of environmental policy is to curb greenhouse gas emissions. One way to achieve this goal may be the development of a market for emissions trading. Such an emissions trading system was launched in the European Union in 2005. These markets, as do others, may witness collusive practices both by buyers and sellers, which might reduce the efficiency of markets and distort price signals. Therefore, competition authorities should take an active role in the design and functioning of these markets to ensure their efficiency and avoid collusive behaviour.[43]

51. Competition authorities may also look into public procurement policy and advocate for a transparent and competitive procurement process to avoid the waste of public resources by bid-rigging practices, inflated bids and corruption. Public procurement represents, on average, between 13 and 20 per cent of gross domestic product worldwide and is therefore significant in terms of allocation and use of public funds, i.e. taxpayers' money.[44] Bid-rigging increases the prices a government pays to goods and services providers. Therefore, competition law enforcement is crucial in detecting and preventing bid-rigging cartels in public tenders. This would allow government revenues to be used efficiently and fairly and even spare resources that may be used to achieve sustainable development goals.

52. In 2006, the Mexican competition authority identified collusion in the public procurement process of the Mexican Institute of Social Security in public tenders for human insulin and electrolytic solutions between 2003 and 2006. The Institute is the third largest public purchaser in Mexico and the largest single buyer of pharmaceuticals and medical supplies in Latin America. In January 2010, the authority imposed a fine of Mex$ 151.7 million on the bid-rigging cartel of six pharmaceutical companies. After implementing the authority's recommendations for making the procurement process more competitive, including by consolidated purchases, reverse tendering, reduced reference prices and opening of bidding procedures to international suppliers, the Institute saved approximately Mex$ 46 billion between 2006 and 2011.[45]

53. In conclusion, competition policy is complementary to other government policies. Therefore, it should not be developed in isolation from the economic, social and environmental realities and needs of a country. Competition policy and law could address challenges faced in these areas and, when appropriately designed and effectively

[42] TD/B/61/2.

[43] KE Johansen, 2008.

[44] Organization for Economic Cooperation and Development, 2013, available at http://www.oecd.org/gov/ethics/meetingofleadingpractitionersonpublicprocurement.htm.

[45] TD/B/C.I/CLP/27.

implemented according to the circumstances of a country, they may contribute to sustainable and inclusive growth and development.

## III. Questions for discussion

54. Suggested questions for discussion include the following:

(a) Should competition laws integrate objectives to achieve sustainable and inclusive growth and development?

(b) How can competition policy and law be designed and implemented in a way that promotes sustainable and inclusive growth and development?

(c) What kind of provisions need to be incorporated in competition laws to address the abuse of buyer power, to ensure fair competition?

(d) What mechanisms can be put in place to deal with the abuse of bargaining power in order to promote fair competition in the market?

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**Seventh United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices**
Geneva, 6–10 July 2015
Item 6 (b) of the provisional agenda
**Consideration of proposals for the improvement and further development of the Set, including international cooperation in the field of control of restrictive business practices**

# Capacity-building and technical assistance on competition and consumer protection law and policy: Review and outlook

**Note by the UNCTAD secretariat**

*Executive summary*

UNCTAD provides capacity-building and technical assistance on competition law and policy to developing and least developed countries, as well as to countries in transition in accordance with requests received, the needs of the countries concerned and available resources. This includes both national and regional assistance in drafting competition laws and policy guidelines, as well as capacity-building in the implementation of competition policy with a long-term perspective in line with the United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices and the requests made by the Sixth United Nations Conference to Review All Aspects of the Set. This report consolidates the annual reviews of the capacity-building and technical cooperation activities of the UNCTAD secretariat since 2010 that were submitted to the meetings of the Intergovernmental Group of Experts (IGE) on Competition Law and Policy between 2011 and 2014. In addition, the report provides an assessment of the impact of UNCTAD intervention in the area of competition and consumer policies in the last five-year period. The final section of this report deals with the outlook for cooperation activities based on the new UNCTAD strategy, Global COMPAL, adopted in 2014.

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## Introduction

1. Taking into account increased needs for technical cooperation and technical assistance for all developing countries, including small island developing States, landlocked developing countries and other structurally weak, vulnerable and small economies and countries in transition, the Sixth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices adopted a resolution [1] (TD/B/RBP/CONF.7/L.16) requesting the UNCTAD secretariat to carry out, in consultation with other organizations and other providers so as to avoid duplication, a review of technical cooperation activities, with a view to strengthening its ability to provide technical assistance for capacity-building in the area of competition law and policy. This consultation was carried out in 2011 and reported to the IGE in a note by the secretariat entitled "Effectiveness of capacity-building and technical assistance extended to young competition agencies" (TD/B/C.I/CLP/11/Rev.1).

2. In accordance with paragraph 4 of the resolution, the note by the secretariat of 2012 entitled "Capacity-building extended to young competition agencies" (TD/B/C.I/CLP/17) reviewed the assistance provided by donor countries, recipient countries and other international organizations. The report of 2013 entitled "Capacity-building and the UNCTAD voluntary peer review as a capacity-building tool" (TD/B/C.I/CLP/22) made a detailed reference to the UNCTAD voluntary peer review process and the particularities of this mechanism in UNCTAD. Finally, the note by the secretariat of 2014 entitled "Review of capacity-building and technical assistance in competition law and policy" (TD/B/C.I/CLP/30) offered a further review of UNCTAD capacity-building activities.

3. The secretariat, in the implementation of the decisions of the Sixth Review Conference and subsequent IGEs, has taken measures to strengthen the Competition and Consumer Protection Policies Programme, as elaborated upon in the following chapters. The relevance, impact and effectiveness of the work of the Competition and Consumer Policies branch have been enhanced as a result of these actions and have gone forward in setting a new worldwide strategy called Global COMPAL based on the successful experience of a programme established since 2003 for the Latin American region.

## A. Rationale for technical assistance and capacity-building of UNCTAD work on competition and consumer policies

### UNCTAD mandate

4. UNCTAD is the focal point on all work related to competition policy and consumer protection within the United Nations system which, in turn, is part of United Nations work on trade and development. The heart of its work on trade and development – the mandate for which dates back to the adoption of the United Nations Set of Multilateral Principles and Rules for the Control of Restrictive Business Practices in 1980 – represents an acceptance of the view that the basic norms of competition law, which have long been in use in developed countries, should extend to the operations of enterprises, including transnational corporations, in developing countries. Thus, the Objectives section of the United Nations Set emphasizes that the interests of developing countries in particular should be taken into account in the elimination of anticompetitive practices that may cause prejudice to international trade and development. Furthermore, the Objectives section sees the United Nations Set as an international contribution to a wider process of encouraging

[1] See para. 4 of the resolution contained in TD/B/RBP/CONF.7/11.

the adoption and strengthening of laws and policies in this area at the national and regional levels.

5. The Sixth United Nations Review Conference called upon UNCTAD in its resolution to "...provide technical assistance for capacity-building in the area of competition law and policy by (...) (e) preparing and executing national, regional and subregional projects on technical cooperation and training in the field of competition law and policy, taking special account of those countries or subregions which have not received such assistance so far, especially in the field of law drafting and staff training, and enforcement capacity; (f) mobilizing resources and widening the search for potential donors for UNCTAD technical cooperation in this area".[2]

6. In addition, paragraph 56 (m) of the Doha Mandate requested UNCTAD to "[C]onduct analysis and research and help developing countries and countries with economies in transition to formulate and implement competition and consumer protection policies, promote the sharing of best practices, and carry out peer reviews with regard to the implementation of such policies".

7. In accordance with the above-mentioned mandates, UNCTAD provides technical assistance related to the preparation, adoption, revision or implementation of national competition and consumer protection policies and legislation, and by building national institutional capacity to enforce effective competition and consumer protection legislation. At the national level UNCTAD therefore organizes:

(a) Assistance in the preparation of competition and consumer protection laws and related legislation;

(b) Consultative meetings to review draft competition and consumer protection laws with representatives of Governments. These activities represent an essential step in the way of competition and consumer protection legislations adoption;

(c) Intensive courses on competition and consumer protection laws and policies including training courses on evidence gathering in competition cases and sectoral consumer protection enforcement;

(d) Training courses for judges on issues related to competition laws and policies;

(e) Training courses on the implementation of competition law for newly appointed commissioners.

8. At the regional level, UNCTAD assists in the drafting and implementation of regional rules on competition. It also organizes a number of conferences, seminars and workshops aimed at contributing to capacity-building and multilateral cooperation in the area of competition. At the regional and subregional levels, UNCTAD therefore conducts:

(a) Studies and reports on strengthening institutions in the area of competition;

(b) Regional workshops and conferences on competition law and policy;

(c) International conferences on competition policies for all regions of the world;

(d) Studies and reports on a possible framework for cooperation on competition policy, trade and related issues for regional integration groupings;

(e) Regional training of judges and public prosecutors on the enforcement of competition law.

[2] See note 1.

9. UNCTAD capacity-building and training activities have increased considerably during the five-year period reviewed. This is due in part to the considerable interest demonstrated by member States, at both the domestic and regional levels, and in part to the solidarity demonstrated by donors from many countries that made generous financial contributions and contributions in kind.

10. This report summarizes the capacity-building and technical cooperation activities of the UNCTAD secretariat from 2010 to 2015, and is based on the yearly reports submitted to the IGE.[3] More detailed information can be found in these reports.

**Contribution of UNCTAD to integrating developing countries and economies in transition into the world economy**

11. The primary aims of UNCTAD are to integrate developing countries and economies in transition into the world economy and to promote the sustainable economic growth of these countries, thus contributing to poverty reduction.[4]

12. The experience of developed and emerging markets has shown that successful integration into the world economy can be correlated with economic growth and poverty reduction. Countries that have opened themselves up to trade and adopted market-oriented policies have grown much faster than those that have not. However, still too often, international and internal barriers prevent them from benefiting fully from the world trading system and the opportunities offered by globalization.

13. To benefit from trade, developing countries and economies in transition must improve their competitiveness and meet the criteria required for international markets. UNCTAD aims to support developing countries' efforts for creating an enabling business environment; and to support their efforts to develop trade capacities. Competition policy is part of an overall development strategy and has the specific objectives of helping developing countries using private sector, trade and investment as an instrument for sustainable growth and poverty reduction. Competition policy is not a substitute but a necessary and increasingly important complement to opening to trade.

14. The rationale for competition policy is based on the observation of market failures and the idea of creating a level playing field for economic operators[5] as well as controlling government monopolies[6]. Further, it provides opportunities for small and medium-sized enterprises to participate in economic activities, and by prohibiting bid rigging, competition law can reduce opportunities for corruption in public procurement.

15. All restrictive business practices imply barriers to entry and higher costs. Some restrictive business practices are significantly higher in developing countries and economies in transition than in developed countries[7]. For example, import and export cartels distort trade and raise costs for consumers and business; monopolies in infrastructure such as

[3] See TD/B/C.I/CLP/11/Rev.1, TD/B/C.I/CLP/17, TD/B/C.I/CLP/22 and TD/B/C.I/CLP/30.

[4] TD/500/Add.1.

[5] This includes challenging agreements between businesses not to compete, through cartels, price fixing and territorial divides, for example. Businesses may also make formal, legal groupings such as marketing boards and cooperatives, which can in effect operate as cartels.

[6] Governments often have restrictive licensing regimes for certain sectors and products, such as for agricultural inputs, for example, seeds and agrochemicals.

[7] Developing economies are particularly vulnerable to anticompetitive practices: poor business infrastructure and complex regulatory and licensing regimes make it harder for companies to enter these markets; their policies, laws and regulations are often not sufficiently robust, while their enforcement agencies lack the capacity to effectively detect and tackle many instances of anticompetitive behaviour; citizens, and businesses are less aware of the importance of competition and do not exercise their rights or fulfil their responsibilities.

telecommunication, financial services and air transport can make doing business very expensive and less readily available, particularly for small and medium-sized enterprises. Hence, the adoption of sound and effective competition laws and policies could play a direct and important role in ensuring that the benefits of opening to trade are not negated by anticompetitive practices or State monopolies. It can also play an important role by ensuring that consumers have the right of access to non-hazardous products, adequate information to enable them to make informed choices according to individual wishes and needs and the right to effective redress. This directly improves their welfare and also contributes to creating a level playing field for businesses and eliminates unfair trade practices such as counterfeiting products.

16. Increasingly, companies and supply chains are international, while competition and consumer protection laws and enforcement agencies are generally national. Individual countries have struggled to address anticompetitive practices and/or practices that violate consumer rights at the international level, which requires regional and global collaboration so that competition and consumer protection rules can be established and enforced.

**UNCTAD work on competition and consumer policies**

17. By working on competition and consumer policies, UNTAD aims to ensure that the benefits of increased competition, open and contestable markets and private sector investment in key sectors are enjoyed by partner countries and ultimately, that consumer welfare is enhanced. The Competition and Consumer Policies Programme services the IGE and the ad hoc expert group meetings on consumer protection policies when mandated, undertakes competition policy peer reviews and implements sector-specific and economy-wide competition and consumer policy reforms that create a level playing field among companies and consumers, increasing the effectiveness of antitrust and consumer protection policies in developing countries and countries in transition.

## B. Review of the main technical assistance and capacity-building activities and their results and impact between 2010 and 2015 by clusters

**Regional programmes and initiatives**

18. From 2010 to 2015, UNCTAD continued to implement regional programmes in two regions in particular: Latin America and Africa. In Latin America, UNCTAD carried out the second phase of the Competition and Consumer Protection for Latin America (COMPAL) programme.[8] In Africa, the West African Economic and Monetary Union (WAEMU) regional programme within the framework of the Competition Programme for Africa, known as AFRICOMP,[9] was implemented.

[8] COMPAL is the Spanish acronym for "Competencia y Protección del Consumidor en América Latina". It is a technical assistance and capacity-building programme on competition and consumer protection that was developed and implemented by the UNCTAD with the support of the State Secretariat for Economic Affairs of Switzerland. The objective of the programme was to develop and promote sustainable competition and consumer protection systems in order to improve the economic performance and competitiveness of participating countries. Promoting a competitive environment in developing countries leads to increased innovation, productivity and international competitiveness, which is particularly important in view of the globalization of international trade and value chains.

[9] Officially launched in Geneva on 22 June 2009, this new initiative was taken in response to the mandate given in the Accra Accord (para. 104 (g)). It is aimed at helping African countries develop appropriate administrative, institutional and legal structures for effective enforcement of competition and consumer law and policies. Most of the UNCTAD technical cooperation activities in Africa in the second half of 2009 were undertaken within the frameworks of AFRICOMP. The programme

19. The second phase of COMPAL, or COMPAL II, was evaluated by external auditors and was based on studies in Colombia, Nicaragua and Peru, and regional activities as perceived from these countries. The following conclusions were reached by the audit:[10]

(a) Relevance: COMPAL is based on national demands established from the bottom-up. Activities carried out in the national components are defined by the partner organizations in consultation with COMPAL management;

(b) Efficiency: COMPAL became a complex programme with both national and regional components, involving 12 countries. In some, 50–60 activities were implemented by a large number of mainly local consultants. COMPAL is surprisingly efficient in terms of outputs in relation to costs. The use of local consultants has especially been a success;

(c) Effectiveness: Taken together, COMPAL I and II have succeeded in making the programme successful, attracting a number of countries outside the original five, most of them joining at their own expense. COMPAL has delivered many activities proposed by partner organizations that are generally recognized to be of satisfactory to excellent quality. COMPAL has been instrumental in setting up competition and consumer protection agencies and in creating awareness on the issues and cooperation in the region;

(d) Sustainability: As these activities are determined by competition and consumer protection agencies, they have a motivation to use the results of COMPAL and integrate them into their ongoing operations. Member States of UNCTAD have made a commitment to include COMPAL activities in their annual work plans. Moreover, in some cases the activities are funded by member States. When sustainability is at stake, this generally means that the inputs have not been sufficiently good to warrant continuation or there is a shift in orientation by management favouring other priorities. In a poorer country such as Nicaragua, whose competition and consumer protection agencies are young, budget constraints in government is a significant risk factor for sustainability;

(e) Management: The role of UNCTAD in managing COMPAL must be considered efficient, with in relative terms, low overheads. The considerable use of electronic means in the administration of the programme is positive and cost-effective in particular;

(f) Advisory Group of Experts: This body was set up to support COMPAL II on the recommendation of the 2007 evaluation of COMPAL I. It is an innovate element of COMPAL that could be further enhanced in the third phase of COMPAL;[11]

(g) The role of the donor: Switzerland has played a critical and essential role in the development of COMPAL. It was instrumental in initiating the programme and was the

provides for a more coordinated and streamlined approach in technical cooperation activities, based on the needs of each beneficiary country while promoting regional cooperation. It emphasizes beneficiaries' ownership and is demand driven. The programme further seeks to establish closer links with the private sector, as well as with non-governmental organizations and local learning institutions. In May 2010, AFRICOMP was expanded to include nine additional beneficiary countries.

[10] See "An Evaluation of COMPAL II. Final Report", 2012, DEVFIN Advisers.

[11] The Advisory Group of Experts is a group of former heads of competition and consumer protection agencies who support the successful implementation of COMPAL activities. The Group was launched along with COMPAL II. Its functions are to provide comments and suggestions to the COMPAL team in Geneva, Switzerland for developing the strategy and activities of the Programme; to identify areas of potential interest to beneficiary countries of the COMPAL Programme; to contribute to the well-functioning and successful achievement of concrete activities of the Programme, namely, by providing comments and suggestions on reports, studies, legislation and bills on competition and consumer protection and participating in conferences, round tables and other COMPAL events; and to participate in field missions in order to ensure the exchange of experiences and provide support to beneficiary countries of the Programme.

first donor to supporting it a long-term commitment of near 10 years. Switzerland has also actively participated in the governance of COMPAL since the beginning and has promoted the programme at various international events.

20. According to the review of the main cooperation activities with WAEMU within the framework of AFRICOMP, a great number of workshops at the national and regional level[12] were conducted in to support WAEMU countries in reforming their competition framework. In particular, UNCTAD has prepared six new bills (regulations and directives) that will amend significantly the institutional and substantive aspects of the regional competition rules. From 2013 onwards, these activities were complemented with a two-week training course organized for their case handlers and the representatives of their member States in cooperation with the Zurich School of Management and Law, back to back with the thirteenth and fourteenth IGE sessions in Geneva. In addition, two drafting sessions were organized in Geneva in cooperation with the Competition Directorate of the WAEMU Commission. The aims of these sessions were to draft guidelines that would decentralize the enforcement power to member States, and thereby improve the enforcement of the community rules in WAEMU. Additional activities in Ouagadougou and in Abidjan in 2014 were carried out to put forward regional amendments of the law. All these reforms will be then presented by UNCTAD before the WAEMU Commission for perusal and approval by the Council of Ministers. The outcome of these activities is central to the effectiveness of the regional competition regime in WAEMU and remains to be seen in the coming years.

21. In 2011, UNCTAD and the Austrian Competition Authority began to collaborate on competition matters concerning the Middle East and North Africa Region. The idea was then presented at a meeting organized in connection with the twelfth IGE in Geneva in July 2012, where the structure that the cooperation initiative could adopt was widely discussed. The debates resumed during a meeting held in Rabat on 15 and 16 November 2012. The meeting consisted of three round tables on the needs of competition authorities in the region, organizational issues of the cooperation initiative and the work programme for the following two years. The first Euro-Mediterranean Competition Forum workshop was organized in connection with the thirteenth IGE in July 2013 and dealt with competition advocacy towards certain constituencies in the private and public sectors. The second workshop was held in Tunis in November 2013 and addressed the relationship between competition agencies and sector regulators. The next two meetings were held on the margins of the International Competition Network in Marrakech, Morocco, in April 2014 and in Geneva back to back to the IGE in 2014.

22. In 2012, UNCTAD and the Bulgarian Competition Authority launched the Sofia Competition Forum. The Forum is an informal mechanism for interaction between the Balkan competition authorities, allowing them to outline the common challenges they encounter in their day-to-day activities as competition agencies. In addition, the Forum will attempt to find approaches to overcome hurdles with regard to the approximation of their national competition policies to the best European and world standards in this field. The beneficiaries are Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Kosovo (United Nations Administrative Region, Security Council resolution 1244 (1999)), Montenegro, the former Yugoslav Republic of Macedonia, and Serbia.

23. In a relatively short period of its existence, the Forum succeeded in attracting to its seminars some of the leading competition experts and prominent speakers from the most experienced and esteemed national authorities and international organizations and

[12] For instance the Regional Competition Forum in Ouagadougou (27–30 November 2012) on the relationship between competition authorities and sector regulators, and competition policy and public procurement within the WAEMU competition regime.

institutions in the field of competition policy. The Forum has recently endorsed and published a report on the comparative overview of Balkan competition regimes, which aimed to compare the laws of neighbouring jurisdictions and outline areas that would require further study and intense cooperation among Forum members. Moreover, the Forum provides an excellent opportunity for active international cooperation, which supports the competition authorities of the participating countries.

24. In late 2014, two major regional programmes were launched for the Middle East and North Africa Region and the region of the Association of Southeast Asian Nations (ASEAN). It is too early to review these programmes, as the implementation of their activities is just beginning. In November 2014, UNCTAD and the ASEAN Secretariat signed a cooperation agreement to launch a regional project for the ASEAN countries in the area of sectoral consumer protection enforcement of relevance to ASEAN economic integration. In addition, the inception phase of the COMPAL Programme with the support of the Swedish Government was launched with field visits in the eight beneficiary countries in the Middle East and North Africa Region in March and April 2015. It is expected that activities will be implemented starting in July 2015 for the period of four years.

**Project review**

25. Between 2010 and 2015, UNCTAD continued its demand-driven efforts to assist in the creation of a competition culture in developing countries. To that end, it provided technical assistance in the preparation, adoption, revision or implementation of national competition and consumer protection policies and legislation, as well as in areas contributing to a better understanding of the issues involved. It also contributed to building national institutional capacity to enforce effective competition legislation. Further, UNCTAD assisted Governments in identifying the role of competition policy in development, its implication at national, regional and international levels, as well as strategies for regional and subregional cooperation in this field. As a result of the voluntary peer reviews prepared by UNCTAD, several national technical assistance projects were carried out as a follow-up to policy recommendations, for example in the tripartite peer review of the United Republic of Tanzania, Zambia and Zimbabwe. Mobilization of resources at the IGE where the individual projects were submitted has been positive. Finally, responses to technical assistance requests have led to the development of national competition projects, such as in the case of Ethiopia, where a project was recently launched in December 2014 with the financial support of Luxembourg.[13] Other technical assistance requests are being channelized through United Nations special funding programmes such as "Delivering as one", particularly in relation to Albania and Mozambique.

26. In a study prepared by the UNCTAD secretariat for the eleventh session of the IGE, it was indicated that the assessment of the impact of capacity-building was a difficult and complex task. This exercise requires information and data that can be difficult to collect to conduct this type of exercise.[14] However, this task can be aggregated and easily collected when delivering long-term regional programmes such as COMPAL with the full commitment of their beneficiaries and partners. The upward trend of UNCTAD technical cooperation and capacity-building activities providing assistance within the framework of regional and subregional groupings can provide a new approach to the worldwide work of capacity-building and technical assistance, as detailed below.

[13] See UNCTAD, 2014, UNCTAD and Luxembourg join forces to strengthen competition policy and consumer protection in Ethiopia, available at http://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=896, accessed 25 April 2015.

[14] See TD/B/C/CLP/11/Rev.1.

## C. Global COMPAL: New UNCTAD capacity-building and technical assistance strategy on competition and consumer policies and laws

27. On the basis of the experience gained from the work under COMPAL for Latin America in the last 12 years, the Secretary-General of UNCTAD launched Global COMPAL in Lima on 5 May 2014. This new strategy is meant to cover competition and consumer protection policies for all regions of the world; therefore, COMPAL has now stands for Competition and Consumer Protection Policies for All.

28. Paragraph 61 of the latest UNCTAD report on Capacity-building (TD/B/C.I/CLP/30) mentioned the Global COMPAL strategy and provided key lessons learned during the 10 years of experience with the Latin American Programme on Competition and Consumer Policies and Laws.

29. COMPAL for Latin America has since become an UNCTAD model of regional cooperation for capacity-building on competition and consumer protection policies and has established itself as the platform in Latin America for knowledge sharing and peer learning and as a model for South–South cooperation. The Programme has succeeded in significantly strengthening legal and institutional frameworks and has managed to place competition and consumer protection policies on the national and regional agendas. Concrete achievements of COMPAL II include the adoption or reform of competition and consumer protection laws and their subsequent enforcement, advice and training for the set-up of competition authorities and the enlargement of the Programme from 5 to 15 members.

30. A second external evaluation of COMPAL in 2012 concluded that it was a successful, worthwhile programme that had made clear contributions to institutional development in Latin America. The evaluation recommended a third phase of the programme with the objective of consolidating the achievements of COMPAL and strengthening regional cooperation. The evaluation further recommended that UNCTAD should replicate COMPAL in other regions such as the Middle East and North Africa, the Balkans, the Commonwealth of Independent States and ASEAN.

31. With this in mind, UNCTAD launched two programmes in the ASEAN region ("Consumer protection matters") and the Middle East and North Africa Region based on the experience in Latin America. In addition, COMPAL III was initiated in Latin America in March 2015. The regional initiative will achieve a self-sustained programme with the aim of consolidating the acquired capacities of the relevant stakeholders and strengthening regional cooperation on competition and consumer protection laws and policies using an integral approach.

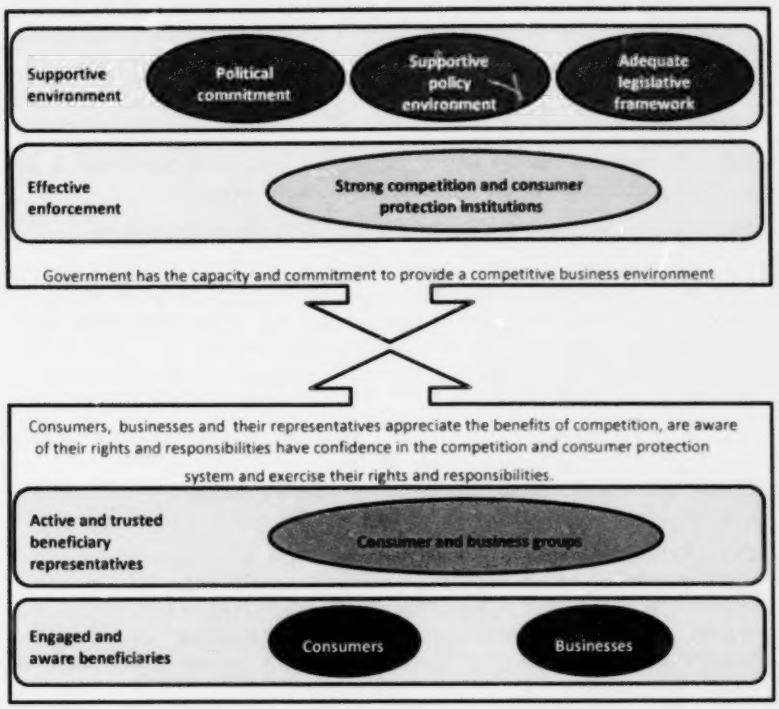
**Intervention strategies: National, regional and global components**

32. The areas of the intervention strategies of Global COMPAL are the national, regional and global components. To ensure partner countries' buy-in and commitment to UNCTAD, all activities will be planned and implemented with the involvement of their competition and consumer protection agencies, as well as other national, regional and global networks where appropriate.

33. The objective of the national component is to strengthen the competition and consumer protection systems in the partner countries. Work under the national component will be entirely demand driven and focused on each country's needs. To ensure strong national ownership of the programme, each country's needs assessments will be conducted in partnership with their competition and consumer protection agencies. The analyses will draw on agencies' strategic priorities and will be informed by other key studies coming from donor's needs assessments of competition agencies, as well as peer reviews of competition law and policy conducted by UNCTAD and the Organization for Economic

Cooperation and Development (OECD). The needs assessments will review all the components of a country's competition and consumer protection system, which are summarized in the figure below. This will cover constraints to competition in specific sectors, considering both business conduct that restrains competition and government policies that burden competition. Based on the findings of the assessments, each country will develop an action plan, setting out its intervention priorities. These plans will be aligned with the strategies of the competition and consumer protection agencies to ensure coherence.

**Components of a national competition and consumer protection system**


Supportive environment
Political commitment
Supportive policy environment
Adequate legislative framework
Effective enforcement
Strong competition and consumer protection institutions
Government has the capacity and commitment to provide a competitive business environment
Consumers, businesses and their representatives appreciate the benefits of competition, are aware of their rights and responsibilities have confidence in the competition and consumer protection system and exercise their rights and responsibilities.
Active and trusted beneficiary representatives
Consumer and business groups
Engaged and aware beneficiaries
Consumers
Businesses

34. UNCTAD will work with partner countries to implement their action plans. While priorities will vary between countries, they are likely to focus on the following:

(a) Improving the policy and legislative environment

(i) Building political commitment. UNCTAD will make the case for competition and consumer protection, targeting key decision-makers in Government, the civil service, parliament and the judiciary. UNCTAD has access to government ministers and parliamentarians owing to its status as a United Nations programme;

(ii) Generating a supportive policy environment. UNCTAD will carry out studies and reviews to identify gaps and inconsistencies between countries' competition policies and other national and regional policies. These might include areas such as investment promotion and industrial policy. UNCTAD will also support Governments to address weaknesses identified by developing appropriate policy positions;

(iii) Strengthening the legislative and regulatory framework. UNCTAD will assist countries to strengthen their legislation and regulations, including through its peer reviews;

(iv) Advising on legal and regulatory changes that can open markets to competition;

(v) Drafting new laws and regulations for effective antitrust policies;

(vi) Carrying out reviews to identify regulatory gaps and inconsistencies with national and regional laws;

(vii) Providing technical advice in the implementation of competition policies, including State aid regulations and competition advocacy initiatives, creating a level playing field across the entire economy;

(viii) Mainstreaming principles of competition policy within broader investment climate reforms,

(ix) Building the capacity of the judiciary to improve its understanding and application of competition and consumer protection regulations.

(b) Building the capacity of competition and consumer protection agencies

(i) Building the capacity of enforcement agencies. UNCTAD will strengthen agencies' substantive and corporate functions. Substantive support will build agencies' capacity in areas such as cartel prosecution, identifying anticompetitive agreements, etc. Corporate support will improve agencies' capacity in areas such as planning, performance management, communications, etc. that are essential for the agencies to operate effectively.

(ii) Both types of support have the ultimate aim of enabling the agencies to better investigate and resolve anticompetitive practices and defend the rights of consumers. Support for communications will also assist agencies to raise awareness of (and confidence in) their services among businesses and the public.

(iii) Developing tools and information products. UNCTAD will assist competition and consumer protection agencies to produce essential tools and information products to identify and tackle anticompetitive behaviour. These will include studies, manuals, guidelines, and knowledge management tools, such as Competition Assessments that identify constraints to the development of competitive markets.

(c) Building the capacity of consumer groups and business associations: UNCTAD will raise their awareness of the details of competition and consumer protection law, and of their rights and responsibilities. The programme will also support these groups with communication and outreach to their constituents.

35. UNCTAD will work with competition and consumer protection agencies to evaluate the success of activities implemented and to identify and compile best practice and key lessons. This information will then be disseminated through the regional and global components.

36. The regional component has two main objectives: to promote peer-to-peer learning between competition and consumer protection agencies and to identify and address international competition and consumer protection issues that require regional collaboration. In addition, regional activities provide an effective avenue for involving other non-partner countries. Involving additional countries in the regional component adds momentum and visibility to the programme, and broadens its impact.

**Peer-to-peer learning**

37. Experience from the previous two COMPAL phases found that regional peer-to-peer learning is an extremely effective tool for building the capacity of competition and consumer protection agencies. It enables those agencies that are more advanced to support and mentor the weaker agencies, which benefits both groups and develops relationships between the agencies which will outlast the programme, ensuring sustainability. The programme will bring together representatives from the national agencies, as well as from regional bodies and networks to share their experiences and discuss key lessons from the programme's work at the national level. UNCTAD will also encourage the more developed agencies to play a leadership role and take responsibility for developing the capacity of the less advanced agencies. An example is the COMPAL School for Competition and Consumer Protection under COMPAL III, which provides training for representatives from competition and consumer protection agencies in all COMPAL countries.

**Addressing regional issues**

38. As companies and value chains become increasingly international, competition and consumer protection issues often need to be addressed at the regional or global level. Countries have to work together to identify cartels and other anticompetitive behaviour, and develop coherent regulatory responses. UNCTAD will provide agencies with the tools to help them identify anticompetitive practices at the regional level.[15] The Programme will facilitate discussions between agencies with shared concerns, providing them with the necessary information and guidance to identify solutions. UNCTAD will continue to provide support to the agencies as they implement these solutions.

39. The objective of the global component is to promote learning between regions by sharing best practice and to identify and address global competition and consumer protection issues. Direct interactions between partners from different regions are valuable for sharing experiences, building networks, identifying areas of common interest and establishing collaborative initiatives. UNCTAD will therefore seek to arrange global meetings back to back with other events, such as the IGE, OECD events and the World Trade Organization Aid for Trade meetings, to allow partners to meet at a manageable cost. However, UNCTAD will also make use of information and communications technology to allow programme partners to collaborate and share information remotely.

**Sharing best practices**

40. As in the regional component, counterparts from competition and consumer protection agencies will share experiences, best practice and lessons learned when they meet at global forums. In addition, UNCTAD will compile information tools and best practice guides as a public resource for all participating countries to use. UNCTAD has already established a virtual library where it will continue to make these resources available. Key documents and executive summaries will be translated into English and, where appropriate, into other United Nations languages.

**Addressing global issues**

41. Emerging global issues will be identified during discussions between partner agencies. UNCTAD will promote deliberations on specific problems with an international dimension and, in response to demand from participating countries, conduct investigations

[15] In Latin America, for example, UNCTAD developed a notifications database, which contains the notifications on anticompetitive behaviour received by national competition agencies. Agencies are therefore able to see whether similar practices have already been notified in another country, which would imply an international cartel.

to provide information to inform these debates. UNCTAD will also seek to link competition and consumer protection agencies from different regions with areas of common interest to promote collaborative initiatives.

**Promoting convergence**

42. As more countries adopt sound competition principles and enforcement techniques, there will be "soft" convergence towards best current practices. This will reduce the costs to business of compliance with increasingly harmonized enforcement standards, encouraging trade and investment to the benefit of developing countries. UNCTAD will work with other multilateral institutions to continue to build consensus on appropriate competition law and policy principles in developing as well as developed nations. The World Bank and OECD will be the most recurrent agencies with which UNCTAD will constantly find synergies and common interests to work together on specific projects and/or activities.

**Assessment of programme interventions, impact and risks**

43. COMPAL interventions will be assessed and their impact evaluated through a number of tools that are also required for all forms of government action when imposing or reducing costs on businesses, the voluntary sector or the public sector. They are a central element of the Government's objective to regulate only where necessary and reduce the burden of regulation on business and the voluntary sector.

**Evaluation and results-based management**

44. Impact evaluation for evidence-based policymaking implies questioning the regulatory work carried out by Governments. Questions such as what works, what does not, where, why and for how much are always relevant in making an evaluation. Common definitions of impact used in evaluation generally refer to the totality of longer-term consequences associated with an intervention on quality-of-life outcomes. For example, the OECD Development Assistance Committee defines impact as the "positive and negative, primary and secondary long-term effects produced by a development intervention, directly or indirectly, intended or unintended".

45. The aim of regulatory impact assessments is to assess the need for, and impact of, proposed regulations and amendments to existing regulations. They are a tool to help policymakers understand the consequences of possible government regulation.

46. The guiding principles of this approach are as follows:

(a) The quality of policymaking and the extent to which they influence development strategies must be viewed within the wider context of the realities of policymaking;

(b) There needs to be a continued and structured approach to post-implementation review across all government departments;

(c) There is a need to ensure clarity on future directions and coverage of competition law and policy during transition towards a market economy;

(d) There is a need to increase government accountability as Government improves the transparency of policy decisions so that it can encourage evidence-based policymaking that helps deliver more effective policy decisions;

(e) Competition policies should explicitly consider the impacts of legislation when it comes into force. There should be a stronger emphasis on compliance and enforcement issues, including the distribution of compliance and associated cost estimates of the proposed enforcement regime;

(f) Support to policymakers should be provided through ongoing senior management commitment that provides proactive rather than passive support and promotes the importance of better regulations. There is a need for greater awareness and an improved understanding of the requirements of competition neutrality; communicating with all public policymaking officials is also necessary. Policymakers should buy in to the benefits of using competition neutrality and understand how it can assist policy development; targeted packages of training and support that integrate competition neutrality into mainstream policy development should be provided.

47. Global COMPAL will face risks, including a potential lack of political will and problems replicating the COMPAL model beyond Latin America. UNCTAD has developed strategies to mitigate these risks.

48. Like other programmes, it will need to mitigate the following risks:

(a) A lack of political will for change;[16]

(b) Belief that the COMPAL approach is not replicable outside of Latin America;[17]

(c) A lack of collaboration from other development partners.[18]

**Thematic geographical focus and the principle of COMPAL interventions**

49. One of the recommendations of external evaluators was that COMPAL has provided an opportunity for a large, thematic global strategy in competition and consumer protection. The previous phases of COMPAL had demonstrated that a large, long-term intervention provided a level and continuity of support that delivered considerable change across regions. There is, therefore, a significant opportunity for replicating and scaling up this approach in other regions. Hence, the main areas of the Global COMPAL strategy are described below.

**Technical assistance for competition and consumer protection policies and regulations**

50. Issue 1: The opening of trade and investment pose a considerable number of complex and challenging issues for developing countries at the national and regional levels, such as monopolization, abuse of dominance, anticompetitive mergers and State monopolies. Countries involved in the globalization process often lack the capacity and the

[16] While all the partner countries have made a commitment to improve competition and consumer protection, there may be a lack of political will to enforce this policy, as local elites and businesses are often comfortable with the anticompetitive status quo. A mitigating factor should be the use by UNCTAD of the main comparative advantage derived from the open-door approach and direct access to politicians and lawmakers in the national parliaments.

[17] The COMPAL approached has proved very successful in Latin America, but has not been tested in other regions. It might not prove so effective in more diverse regions, particularly those with several languages, which could limit the sharing of best practice and peer learning. A mitigating factor could be the regional components of each region, as they could be the best catalyst for introducing pilot programmes and cross-fertilization between regional components of other regions. In addition, cross-continent sectoral studies will be of crucial importance to further indicate commonalities between companies operating in regions with similar business patterns.

[18] Several other organizations, such as OECD, the International Competition Network, the International Consumer Protection and Enforcement Network, the World Bank and the Inter-American Development Bank, are working in the field of competition and consumer protection. If they do not engage with Global COMPAL, there is a risk that competition and consumer protection agency partners will receive inconsistent and contradictory advice. A mitigating factor could be that Global COMPAL will have an interoperability scheme whereby all partner organizations will have to communicate activities through the pressure of donor countries such as Switzerland.

institutions necessary for introducing and adopting regulatory reforms to deal with such challenges.

51. Approach 1: The aim is to enhance the effective capacities of developing countries to adopt and implement competition programmes. To this end, UNCTAD supports the following measures:

(a) Introduction of competition policy frameworks and national legislation;

(b) Institutional capacity-building, including establishment of competition agencies;

(c) Training and upgrading skills of enforcers in the area of competition policies;

(d) Regional cooperation initiatives across these areas.

52. Issue 2: Opening to trade provides potential benefits not only to business but also to consumers. However, consumer protection laws are necessary to ensure that anticompetitive practices do not harm consumer welfare; such laws therefore complement competition law and policy in ensuring that consumers have access to non-hazardous products, to adequate information to enable them to make informed choices and to effective redress in case of injury.

53. Approach 2: The aim is to enhance the effective capacities of developing countries to adopt and implement consumer protection programmes. To this end, UNCTAD supports the following approaches:

(a) Introduction of consumer protection policy frameworks and national legislation;

(b) Institutional capacity-building, including establishment of consumer agencies;

(c) Training and upgrading skills of enforcers to provide effective and affordable redress to consumers;

(d) Combating unfair trade practices such as misleading advertising, fraud, data protection and counterfeit products;

(e) Regional cooperation initiatives across these areas.

**Creating an enabling environment for the private sector**

54. Issue: Raising trade capacities and ensuring a greater integration into international value chains remain a challenge for enterprises, particularly for small and medium-sized enterprises in beneficiary countries.

55. Approach: The aim is to assist the private sector in beneficiary countries in building up sustainable capabilities by meeting international norms and standards and by creating a competitive environment without unnecessary bureaucratic burdens. To this end, UNCTAD will support the following measures:

(a) Advocacy for understanding competition law principles and voluntary compliance;

(b) Guidelines and information notes for businesses on the substantive application of competition and consumer laws;

(c) Guidelines on leniency programmes for business executives;

(d) Training workshops, seminars for State-owned enterprises and government departments to ensure that regulation and government measures do not crowd out private sector activities;

(e) Information notes and awareness-raising activities on the need to integrate the informal sector into the formal economy;

(f) Advocacy for eliminating unfair trade practices, including counterfeit products.

**Competition neutrality**

56. Issue: Both public and private anticompetitive practices are an important reason why economic growth and development has not yet reached its full potential in many developing countries. The elimination of government measures such as State aid to State-owned enterprises, favourable tax treatments and discounts is a major obstacle to the efficient use of scarce public resources. It is only by complying with non-discriminatory treatment of public and private enterprises as well as repealing outdated and unnecessary regulations that the potential benefits of trade and investment liberalization can be secured in the long term. In most countries, promoting a vibrant private sector and of a public sector that enjoys good governance, transparency, accountability and freedom from corruption may allow the potential for economic growth, development and poverty alleviation to be achieved.

57. Approach: The aim is to assist Governments in adopting both competition neutrality and appropriate frameworks for enforcing competition law. To this end, UNCTAD supports the following:

(a) Formulation of a national competition neutrality strategy;

(b) Dialogue between policymakers, legislators and senior management of State-owned enterprises on the need for policy coherence between competition, consumer and other public policies;

(c) Selected studies on infrastructure and public utilities;

(d) Regulatory impact assessment studies;

(e) Developing coherence strategy between industrial trade, investment and competition policies.

**Follow-up and impact assessment of activities**

58. Issue: Beyond independence and accountability of the competition and consumer protection agencies, the overall political and social support is an essential component for a competition culture. In particular, one of the key pre-conditions for a meaningful development of a competition culture is broad support by consumers and businesses, the existence of competition neutrality and full compliance with the competition law by public and private enterprises.

59. Approach: To address some of these challenges, UNCTAD carries out peer reviews as well as other country reports which identify weaknesses, strengths and areas of improvement. These recommendations are incorporated in annual capacity-building activities extended to peer-reviewed countries and reported to the IGE on Competition Law and Policy. UNCTAD through this new strategy will further support:

(a) Voluntary peer reviews of new member countries;

(b) The review and consultations on the findings and recommendations for discussion at the IGE;

(c) Advisory services and training for competition and consumer policies agencies;

(d) The development of coherent competition and public policies;

(e) The organization of a national dialogue, forums on development of trade and investment and poverty reduction strategies.

**Expanded regional focus**

60. Issue: COMPAL initially put its focus on Latin American countries. At the outset, this was considered to be a pilot group of beneficiary countries facing similar hurdles under common economic, social and cultural backgrounds. While it is crucial for UNCTAD to continue to support Latin American countries, lessons learned, and products and best practices developed can also be shared with countries in other regions. UNCTAD has received a large number of requests from countries willing to join COMPAL and/or have access to the products developed so far. This expansion would have a positive and multiplier effect on other developing countries outside Latin America. The recent launch of the COMPAL Middle East and North Africa Region programme is an example of this.

61. Approach: In order to effectively facilitate the accession of new members into the Programme and to respond to different needs and circumstances, tailor-made policy advice and capacity-building activities will be extended to beneficiary countries. UNCTAD should be able to advise and add value to the most advanced competition and consumer protection agencies in different regions of the developing world. Hence UNCTAD should support:

(a) Expansion of the Advisory Group of Experts to include talent from other regions;

(b) Establishment of a knowledge management platform available in three United Nations languages (Spanish, English and French) that facilitate access to all products (manuals, guidelines and studies produced under COMPAL);

(c) Development of a national development strategy for each new member country.

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Geneva, 6–10 July 2015
Item 6 (b) of the provisional agenda
**Consideration of proposals for the improvement and further development of the Set, including international cooperation in the field of control of restrictive business practices**

# Voluntary Peer Review of Competition Law and Policy:

# Albania

## Overview*

* This document is an overview of the voluntary peer review of competition law and policy in Albania (UNCTAD/DITC/CLP/2015/1).

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## Note

Voluntary peer reviews of competition law and policies carried out by UNCTAD fall within the framework of the Set of Multilaterally Agreed Principles and Rules for the Control of Restrictive Business Practices (the United Nations Set of Principles and Rules on Competition), adopted by the General Assembly in 1980. Among other things, the Set seeks to assist developing countries in adopting and enforcing effective competition law and policy suited to their development needs and economic situation.

The designations employed and the presentation of the material do not imply the expression of any opinion whatsoever on the part of the United Nations Secretariat concerning the legal status of any country, territory, city or area, or of its authorities, or concerning the delimitation of its frontiers or boundaries, or regarding its economic systems or degree of development.

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UNCTAD Voluntary Peer Reviews of Competition Law and Policies are conducted at annual meetings of the Intergovernmental Group of Experts on Competition Law and Policy or at five-yearly United Nations Conferences to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices. The substantive preparation is carried out by the Competition and Consumer Policies Branch of UNCTAD.

This report was prepared for UNCTAD by Kiril Pangelov, Director of Legal Analyses and Competition Policy Directorate of the Bulgarian Competition Authority. The substantive backstopping and review of the report was the responsibility of Graham Mott and Hassan Qaqaya, former Head of the Consumer Policies Branch.

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# I. Historical, political and economic context

## 1.1 Historical and political development

1. Following the Second World War, the Albanian resistance movement, headed by the Communist Party, took control of the country. After 46 years, the regime fell and in 1992 the first democratic parliamentary elections were won by the Democratic Party of Albania. In November 1998, the new Albanian Constitution was approved by national referendum and led to the establishment of a democratic system of State government, in the form of a unitary parliamentary republic, based on the rule of law and the protection of fundamental human rights.

2. Gradually, Albania has overcome its previous international isolation and is now a member of some of the most prestigious global and regional organizations and institutions such as the United Nations (1955), the Organization for Security and Cooperation in Europe (1991), the European Bank for Reconstruction and Development (1991), the International Monetary Fund (1991), the World Bank (1991), the Organization of Islamic Cooperation (1992), the Council of Europe (1995), the World Trade Organization (2000), the Central European Free Trade Agreement (2007) and the North Atlantic Treaty Organization (2009). Albania is a potential candidate for membership of the European Union.

## 1.2 Economic development

3. During the 46-year Communist regime, Albania had a strictly centralized economy controlled by the Government with no market mechanisms.[1] At the end the regime, Albania was ranked among the poorest countries in Europe in terms of gross domestic product (GDP) per capita, at $1.825 (1992).[2] Extreme poverty and the informal economy were widespread in Albanian society, although not officially recognized until 1991.[3] The economic and social conditions during the 1900s led to significant waves of emigrants, especially to neighbouring Italy and Greece.

4. In the mid-1990s, a long and difficult period of transition from a command economy to a market economy, began.[4] As a result of structural reforms in the mid-1990s, Albania has made impressive economic progress, achieving macroeconomic stability and one of the fastest rates of annual GDP growth in Europe: 9.4 per cent (1994), 8.9 per cent (1995) and 9.1 per cent (1996).[5] After the drastic decline in annual GDP in 1997 (minus 10.2 per cent) as a result of the Albanian Rebellion of 1997, the country again joined the ranks of

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[1] M Muço, 1997, *Economic Transition in Albania: Political Constraints and Mentality Barriers*, NATO Individual Fellowship Programme 1995–1197, June.

[2] International Monetary Fund, 2006, *World Economic Outlook Database*, April.

[3] United Nations, 2010, *Albania National Report on Progress Toward Achieving the Millennium Development Goals*.

[4] S Gruda and L Milo (Lati), 2010, SMEs development and competition policy in Albania, Portal on Central Eastern and Balkan Europe [PECOB's] Papers Series, School of Economics, Tirana University.

[5] European Bank for Reconstruction and Development, 1999, *Transition Report 1999: Ten Years of Transition – Economic Transition in Central and Eastern Europe, the Baltic States and the CIS*, London.

European countries with positive economic development in terms of GDP growth: 12.7 per cent (1998), 10.1 per cent (1999) and 7.3 per cent (2000).[6]

5. Albania is now a middle-income transition economy that has maintained positive growth trends and financial stability as one of the fastest-growing European economies. The average annual real growth rate of 6 per cent in the first decade of the twenty-first century has reduced poverty by half and doubled the country's exports.[7] The private sector, consisting mainly of small and medium-sized enterprises (SMEs), is the major engine of Albania's economic growth, providing 75 per cent of GDP and 83 per cent of employment.

6. There are still some key challenges to continued economic development, particularly with low industrial productivity and an informal economy that is estimated to account for between 24 per cent (World Bank) and 58 per cent (Government of Albania) of GDP.[8] In terms of the quality of its business environment, Albania has registered certain improvements but still ranks below most other European countries.[9]

7. In recent years, Albania's economic growth has slowed, reflecting the existing difficulties faced by its major trading partners, Italy, Greece and Spain.[10] Although the country has not suffered severe effects from the recent global financial crises, the Albanian Government had to enact budgetary restraints by reducing fiscal revenue plans, cutting expenditure and increasing budget deficits to around 6.1 per cent of GDP in 2013.[11]

### 1.3 Accession to the European Union

8. Albania's European integration is seen as one of the most significant ambitions of the Albanian nation in the post-Communist years, as most Albanians support the country's accession to the European Union.[12]

9. Albania has been recognized as a potential candidate for membership of the European Union since June 2003. In June 2006, the country signed the Stabilization and Association Agreement. Shortly after its entry into force on 1 April 2009, Albania applied for membership of the European Union.[13] The key element of the integration process is the harmonization of Albanian legislation with European law. Some of the most important chapters of the Agreement concern economic and commercial provisions, including competition law clauses.

## II. Development of Albanian competition policy

10. The historical development of Albanian competition policy reflects the political and economic changes in the country during the years after the fall of Communism and has

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[6] International Monetary Fund, 2006, *World Economic Outlook Database*, April.

[7] World Bank Group, 2013, *Albania -Partnership Programme Snapshot*.

[8] S Gruda and L Milo (Lati), 2010.

[9] World Bank, 2013, *2014 Doing Business report – Albania*.

[10] European Bank for Reconstruction and Development, 2013, *Transition Report 2013, Country Assessments – Albania*.

[11] Law No. 119/2012 of 17 December 2012, amended by Law No. 6 of 4 October 2013.

[12] Albanian Institute for International Studies, 2012, *The European perspective of Albania: Perceptions and Realities*.

[13] European Commission, 2013, *Albania 2013 Progress Report, Enlargement Strategy and Main Challenges 2013–2014*, Brussels.

been greatly influenced by Albania's progress in its efforts towards integration in the European Union.

### 2.1 First competition law of 1995

11. Competition policy in Albania began in 1995 when the first competition law was adopted.[14] Albania was one of the first countries from the Western Balkans to have drafted its own national competition law.[15]

12. Most of the provisions contained in the first law remained only on paper and determined the need to adopt an entirely new law that would ensure the establishment of an independent competition authority and better protection of free and effective competition in the country.[16]

### 2.2 Second competition law of 2003

13. The new law, the Competition Act, was approved in 2003 with the main objectives of protecting free and effective competition in the marketplace and defining the rules of conduct for undertakings, as well as for the institutions responsible for the protection of competition.[17] A crucial step forward was the establishment of an independent national competition authority empowered to fully enforce the law.[18]

14. The Act was designed to provide protection of the public interest against any distortions of market competition. As such, the rules on unfair competition have been left to be dealt with under the Albanian Civil Code. The Act is applicable to all sectors of the Albanian economy without excluding or exempting any markets or types of economic activity from its scope of application.

### 2.3 Reform of competition law in 2010

15. The Act was amended in 2010 to achieve further approximation with European Union legislation and improve its implementation.[19]

## III. Albanian Competition Authority

16. Competition policy in Albania is implemented by the Albanian Competition Authority, which is also responsible for the enforcement of Community acquis in the process of Albania's integration in the European Union.

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[14] Law No. 8044 of 7 December 1995.

[15] MA Dutz and M Vagliasindi, 2002, Competition policy implementation in transition economies: an empirical assessment. European Bank for Reconstruction and Development, London.

[16] European Commission, 2003, *Albania Stabilization and Association Report 2003*, Brussels.

[17] Law No. 9121 of 28 July 2003, Fletorja Zyrtare No. 71 (2003), pp. 3189–3211.

[18] P Broka and A Laci, 2010, *Development of Competition Law and Policy and its Implementation as a Challenge for the European Union Integration*.

[19] P Broka and E Nazifi, 2011, Novelties in Albanian competition law, Risitë në të drejtën shqiptare të konkurrencës, *Revista Studime Juridike*; S Gruda B Bushati and A Dibra, 2012, Control of mergers and acquisition: Its impact on the market development in Albania, *Journal of US-China Public Administration*, vol. 9, No. 3.

## 3.1 Legal status and competence

17. The Albanian Competition Authority is an independent public legal entity located in Tirana.

## 3.2 Composition and structure

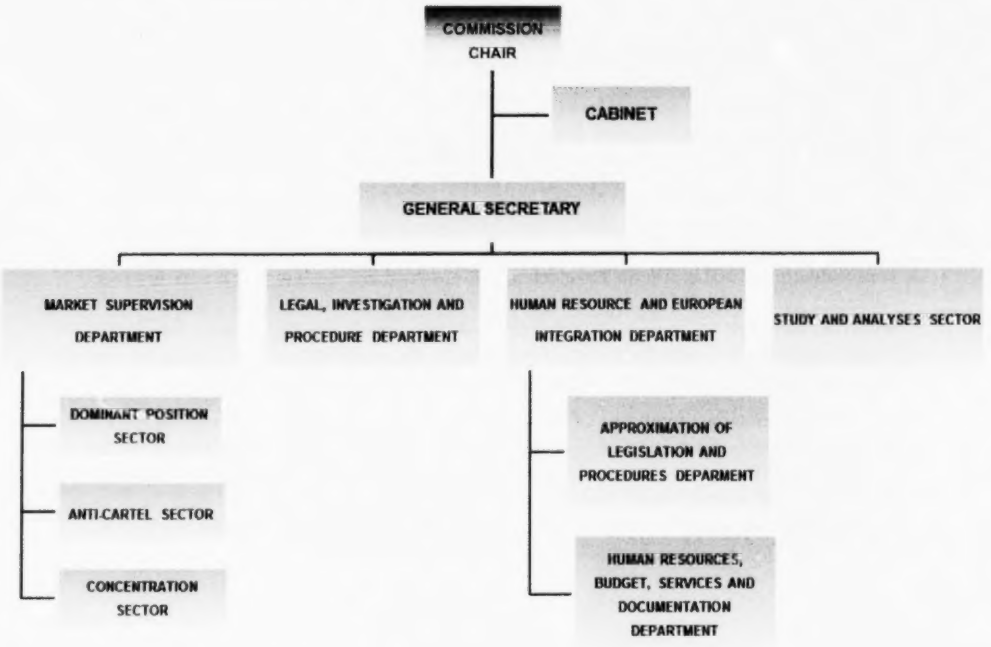
18. The Authority is composed of a decision-making body, the Competition Commission, and an investigative body, the Secretariat. The two bodies are functionally separated within the organizational structure of the Authority (figure 1).[20]

19. The Commission is a permanent collegial body of five members that exercises the decision-making powers of the Authority.[21] Members are elected by the Parliament for a five-year fixed term, with the possibility of re-election, but not more than for two consecutive terms. The criteria for election are provided by the law and are as follows: Albanian citizenship, 15 years' working experience; a doctorate or experience as a university lecturer in law or economics; and no record of disciplinary dismissals. The Commission is headed by a Chair, who manages the Authority's daily work, chairs the meetings of the decision-making college and ensures implementation of the law.

20. The Secretariat, composed of three departments and one sector, is the investigatory body that conducts administrative investigations and studies under the competition law. Its officials are civil servants who work under a Secretary-General elected by the Commission. The main responsibilities of the Secretariat are provided for in the Act, and its organizational structure is approved by the Albanian Parliament (decision No. 96, 30 April 2007).

[20] Law No. 9584 of 17 July 2006.
[21] Law No. 9121, art. 19.

Figure 1
**Albanian Competition Authority, 2014**




21. Each department is headed by a director who manages the work and ensures the efficient use of human resources. The directors report to the Secretary-General.

22. The Secretary-General is in charge of the daily work of the Secretariat. In his absence, his responsibilities are delegated, by approval of the Chair of the Commission, to one of the departmental directors. The Secretary-General approves all procedural reports made by Secretariat officials.

## 3.3 Independence

23. The Authority is constituted under the Act as an independent specialized State body, which is financed by the State budget. Its organizational structure is approved and may be amended only by Parliament. The Authority reports on its activities solely to Parliament.

24. Members of the College are elected and dismissed by the Parliament on the basis of criteria and procedures outlined in detail in the Act. They are nominated under a quota system by the President, the Council of Ministers and the Parliament. The mandate principle and rules of incompatibility apply to nominees, who if elected have an opportunity to serve for another term if re-elected.

25. The investigation and resolution of competition cases are internally separated between the Commission and the Secretariat, as this establishes procedural safeguards for

the independent conduct of case studies. Authority staff have civil servant status and are obliged to keep professional secrecy as well as avoid conflicts of interest.[22] This obligation continues even after the termination of their duties.[23]

26. The Authority has adopted a code of ethics, which determines the general ethical standards for its activity in light of its mission as an independent institution protecting market competition.[24]

27. Furthermore, capacity strengthening has been recognized by the Albanian Authority as a tool to enhance the independence of the competition institution.[25]

## 3.4 Operations

28. In accordance with the Act, the Authority's operations are based on investigation (research) and decision-making in the areas described below (figures 2 and 3).

### 3.4.1 Antitrust enforcement

29. The Authority enforces antitrust rules, prohibiting entry into horizontal or vertical agreements that have as their object or effect the prevention or distortion of market competition. Moreover, the Authority applies a prohibition of abuse of dominance of undertakings. It has jurisdiction to establish antitrust infringements as well as to impose sanctions or other remedial measures on infringers.

### 3.4.2 Merger control

30. The Authority exercises ex ante control over all operations between independent undertakings that represent a form of concentration of economic activity and may produce effects on competition in the relevant domestic markets affected by the operations. In this respect, the law provides for a notification regime under which the merging parties are obliged to inform the Authority on the upcoming transaction in advance.

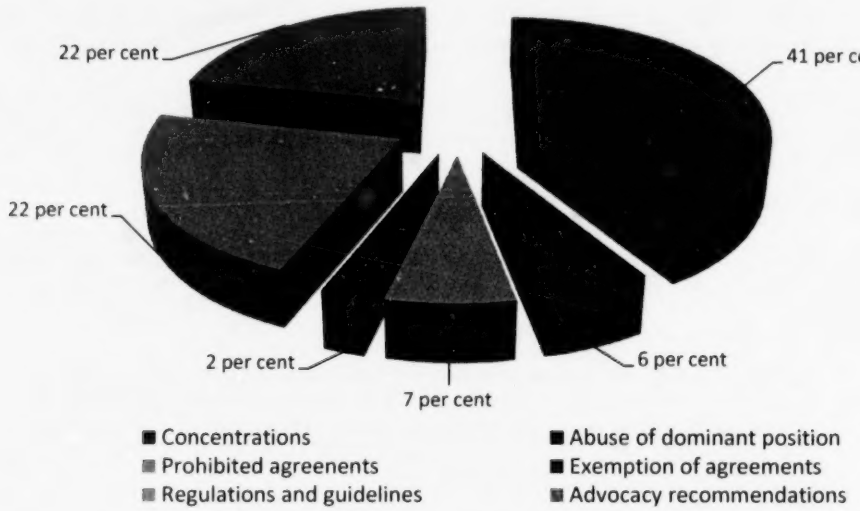
[22] Law No. 9367 of 7 April 2005.

[23] Law No. 9121, art. 30.

[24] Law No. 9131 of 8 September 2003.

[25] Albanian Competition Authority Annual Report for 2012 and Main Goals for 2013; S Gruda and P Melani, 2010, Some challenges of competition authorities of small countries toward European integration: The case of Albania, *Western Balkans Policy Review*, vol. 1, Issue 1.

Figure 2
**Decisional practice of the Authority by type of activity, 2004–2013**




### 3.4.3 Sector enquiries

31. The Authority may conduct general enquiries in any sector of the economy, on its own initiative or following a request by the Parliament or other regulators if the rigidity of prices or other circumstances suggest that competition is being restricted or distorted in the market.

### 3.4.4 Competition advocacy

32. Competition advocacy is one of the main activities of the Authority's operations.[26] Competition impact assessment of legislation is explicitly provided for in the Act.[27] The Authority is also empowered by law to participate in regulatory reforms by issuing appropriate recommendations to the competent policymakers and sector regulators.

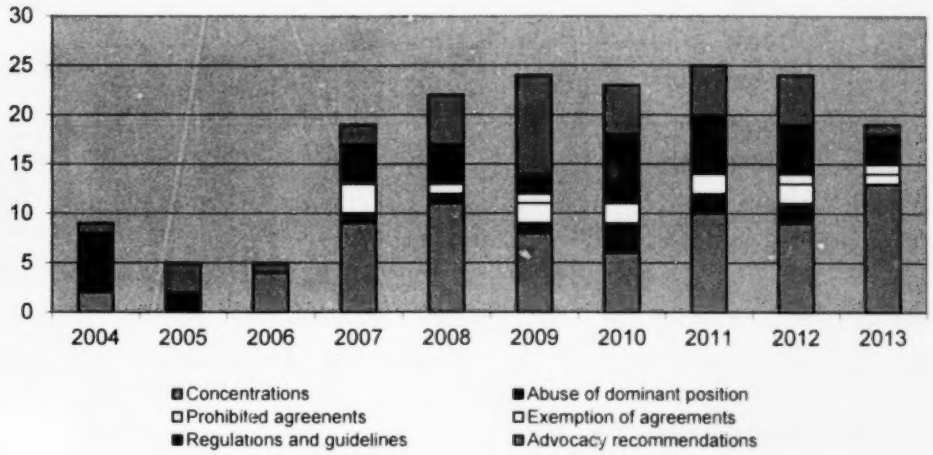
33. The Authority facilitates competition advocacy by concluding memorandums of understanding or maintaining close interinstitutional ties with leading regulatory institutions and non-governmental organizations in Albania.

### 3.4.5 Approximation of legislation

34. The Authority considers the approximation of national competition law to European rules to be one its top priorities.[28]

[26] Albanian Competition Authority Annual Report for 2012 and Main Goals for 2013.
[27] Law No. 9121, arts. 69 and 70.
[28] See note 26.

Figure 3
**Decisional practice of the Authority, 2004–2013**

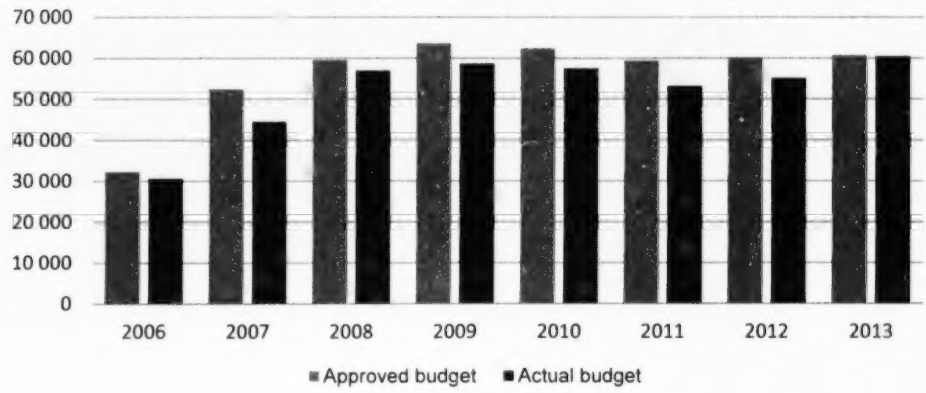



## 3.5 Administrative resources

### 3.5.1 Financial resources

35. The Authority's annual budget is approved by the Parliament as a separate article in the State budget law (figure 4).

Figure 4
**Annual budget of the Authority, 2006–2013**
*(Thousands of Albanian lek)*




### 3.5.2 Human resources

36. The total number of staff of the Authority is 36. Twenty-five are expert officials: 13 economists, 9 lawyers, 2 information technology experts and 1 linguist.

### 3.5.3 Information resources

37. The Authority maintains an official website that provides detailed information in Albanian and English on its activities, competition legislation and Commission decisions. It also contains annual reports, press releases and other publications. The Authority publishes a bulletin of decisions along with annual reports and disseminates publications, brochures and informational booklets. Although the Authority does not have a library within its internal administrative structure, it is constantly improving its information resources, including books and training materials.

# IV. Substantive competition law

## 4.1 Legal sources of Albanian competition law

38. Competition law in Albania is based on the Constitution, which specifies that the economic system of the country is based on private and public property, a market economy and freedom of economic activity. This principle is further developed at a statutory level in the Act.

## 4.2 General objectives and applicability

39. The general objective of the Act is the protection of free and effective competition in the market by setting behaviour rules for the undertakings.

40. The national competition rules cover all undertakings that operate in the territory of Albania (territoriality principle), as well as undertakings that operate abroad, when their activities could affect competition in domestic markets (effects principle). The law is also applicable to all central and local administration bodies, which must ensure free and effective competition when carrying out tasks related to the regulation of economic activity.

41. The Act provides clear legal definitions with a view to facilitating its applicability.[29]

## 4.3 Substantive antitrust provisions

42. The substantive antitrust provisions, which the Authority is empowered to enforce, cover collusive agreements between undertakings (art. 4) and abuse of dominant positions (art. 9).

### 4.3.1 Collusive agreements

43. Similarly to art. 101 (1) of the Treaty on the Functioning of the European Union, the Act contains a general prohibition for all types of agreements having as their object or effect the prevention, restriction or distortion of competition.

44. Albanian competition law outlines a regime of individual and block exemptions for collusive agreements between undertakings. Prior its amendment in 2010, only individual exemptions could be granted. Based on this new power and following European Union initiatives in this field, the Authority granted several block exemptions in research and development, vertical agreements, the motor vehicle industry, insurance, agreements on specialization and technology transfer agreements.

45. Since the 2010 amendments, a de minimis rule has been applied to all agreements that do not significantly restrict competition depending on their aggregate market share: 10 per cent for horizontal agreements and 15 per cent for vertical agreements. The de minimis rule is objectively applicable to all types of agreements, as there are no hard-core restrictions that are explicitly excluded from its scope of application.

46. Prohibited agreements that are not exempt under individual or block exemption regimes and are not covered by the de minimis rule are declared to be null and void by the Act.

47. Competition law in Albania provides a notification regime regarding agreements between undertakings and empowers the Authority to make preliminary compliance assessments. This regime is not applied to agreements that are exempt by virtue of the Authority's block exemption regulations. In this respect, the Authority has issued specific guidelines on the notification of agreements.

48. Competition law does not contain a legal definition of cartels and they are treated in the same manner as other types of prohibited agreements.

### 4.3.2 Abuse of a dominant position

49. Similarly to art. 102 of the Treaty on the Functioning of the European Union, a general prohibition of abuse of dominance by one or more undertakings in the market is provided for under the Act.

50. A dominant position is defined as a position of economic strength enjoyed by one or more undertakings, enabling the prevention of effective competition in the market by

[29] Law No. 9121, art. 3.

granting the power to behave, with regard to demand or supply, independently of other market participants such as competitors, customers or consumers.[30] The Act acknowledges that several undertakings can enjoy a collective dominant position. In such cases it should be determined whether these undertakings compete effectively with each other and are able to achieve common conduct in the market.[31]

51. According to the Act, any abuse of dominance by one or more undertakings in the market is forbidden. The Act provides a non-exhaustive list of different unilateral practices that may constitute an abuse of dominance. The prohibition covers both exclusionary and exploitative abuses, as these are usually parts of an anticompetitive strategy of dominant undertakings aimed at the exclusion of its competitors and market foreclosure to enable illicit exploitation of its suppliers or customers.

## 4.4 Substantive provisions on mergers and acquisitions

52. Merger control is one of the main pillars of the Authority's work. It is based on the different types of operations or transactions that are subject to the notification regime under the Act and the assessment methodology that is applied to authorize or prohibit them. According to the law, a concentration of undertakings is deemed to arise where a change of control on a lasting basis results from a merger, acquisition or creation of a concentrative joint venture.[32]

53. The undertakings participating in a concentrative transaction must notify the Authority of the operation in advance so as to receive authorization. The transaction should be notified, provided that the combined total turnover of all participating undertakings worldwide is more than lek 7 billion (about $70 million), and the turnover of at least one of the undertakings amounts to more than lek 200 million (about $2 million) within the internal market of Albania. Alternatively, the merger is notifiable if the aggregate turnover of all the undertakings in the internal market is more than lek 400 million (about $4 million), and the turnover of at least one undertaking within the domestic market is more than lek 200 million (about $2 million).

54. The notification obligation rests with the merging companies (in case of a merger), with the undertaking acquiring control (in case of a takeover) and with the undertakings acquiring joint control (in case of a joint venture).

55. The Authority applies the significant impediment of effective competition test and is empowered to prohibit transactions that significantly impede effective competition in the market or in a part thereof, particularly as a result of the creation or strengthening of a dominant position. In certain cases, the Authority might not forbid a transaction on the basis of considerations of failing firm defence, provided that one of the participating undertakings seriously risks bankruptcy and exiting the market, and there is no other less anticompetitive way to avoid such failure.

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[30] Ibid.

[31] P Broka, 2010. Abuse of dominant position under competition protection legislation. Abuzimi me pozitën dominuese sipas legjislacionit për mbrojtjen e konkurrencës. *Revista Studime Juridike*, No.2.

[32] Law No. 9121, art. 10.

# V. Procedural aspects of Albanian competition policy

## 5.1 Handling of complaints

56. Based on the Act, the Albanian Competition Authority can act upon complaints, its own initiative (ex officio), leniency applications, merger notifications and requests by State bodies.

57. Complaints are required to be made using a specific form (the model complaint form), which may be submitted to the Authority either electronically or on paper. The Authority takes into consideration all complaints addressed to the institution but processes only those which fall within the scope of the Act. A substantial proportion (about 30 per cent) fall outside the scope of its jurisdiction and are forwarded to the relevant authority or institution.

## 5.2 General rules of infringement proceedings

58. Infringement proceedings before the Albanian Competition Authority may be instituted on the basis of complaints or ex officio by the Authority's own decision following findings from a sector enquiry or request by the Parliament or another State body.

59. Upon approval by the Commission, the Secretariat may initiate preliminary investigations on its own initiative or following a complaint. The Secretariat initiates a preliminary investigation whenever requested by the Commission, the purpose of which is to establish whether there is sufficient premise for suspicion that antitrust violations have been committed. Provided that there are indications of competition restrictions, an in-depth investigation is initiated following a Commission decision, on the basis of which the Secretariat takes all necessary investigatory steps provided in the Act. The Authority gives notice of the initiation of an in-depth investigation in the Authority's Official Bulletin, which states the purpose of the investigation and parties concerned and invites interested third parties to come forward if they wish to participate.

60. The deadline for a preliminary investigation is not specifically regulated by the Act but, given a general reference to the Code of Administrative Procedures, the duration of a preliminary investigation should not exceed three months. The duration of an in-depth investigation is explicitly provided for in the Act as six months from the opening of proceedings with the possibility of extension by Commission decision, although without explicit specification of the length of extension.

## 5.3 Investigations of competition cases

61. The investigation of cases is conducted by Secretariat officials on the basis of the Commission's decision to opening a case. The Secretariat conducts investigations in accordance with the Code of Administrative Procedures, competition law and sublaws applicable to the Albanian Competition Authority's infringement proceedings.[33]

62. The investigatory work on cases is performed by working groups of officials established by an order of the Secretary-General, on the basis of a proposal by the Director of the Market Monitoring Department. An official from the Juridical and Integration Department is also included in each group. The Secretary-General appoints the head of the

[33] Law No. 8485 of 12 May 1999.

group. After an investigation has been finalized, the group presents a report to the relevant directors and the Secretary-General by providing a factual, legal and economic analysis, as well as a proposal to the Commission concerning the manner of conclusion.

63. The Secretariat exercises all necessary investigatory powers provided for by the Act to establish the relevant case facts namely, request for information, collection of information from State authorities, on-the-spot inspections of business premises, on-the-spot inspections of non-business premises, seizure of evidence and interviews.

## 5.4 Procedural status of parties involved in infringement proceedings

64. Parties to the Albanian Competition Authority's infringement proceedings are the complainant who has filed a claim of infringement, the respondent as to whom the infringement is to be established and interested third parties constituted to the proceedings.

65. According to the procedural rules under the Act, the parties under investigation have the right of defence, which is valid throughout the entire procedure but changes scope depending on the procedural stage at which this right is exercised. Albanian law does not provide for a privilege against self-incrimination in infringement proceedings before the Authority, as this is granted only in criminal proceedings.

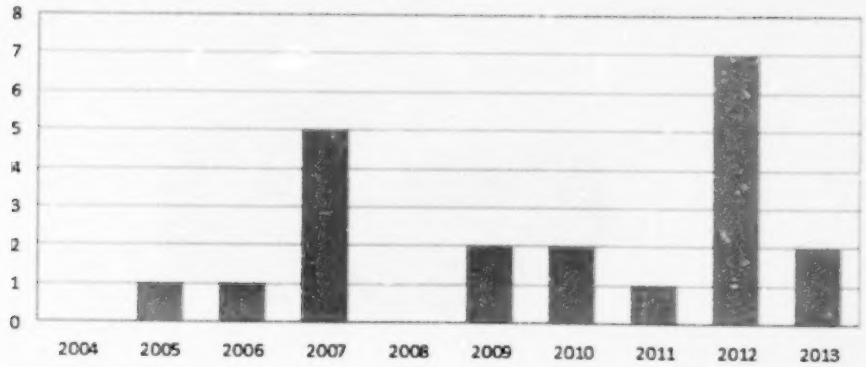
66. Along with their procedural rights, parties to infringement proceedings bear certain obligations to the Authority that are provided for in the Act to facilitate the process of fact finding and guarantee the full and effective enforcement of competition rules. In the event of failure to duly implement these obligations, the Act provides sanctions for the respective parties.

## 5.5 Decision-making on competition cases

67. Decision-making on competition cases is performed by the Commission, which as a collegial body takes decisions in meetings. Commission meetings are valid when at least four members are present along with the Chairperson or Deputy. The Commission resolves competition cases during regular meetings but, if necessary, the Chairperson may call extraordinary meetings. The Commission may take decisions only on issues that have been included in the agenda, except when the majority of the Commission decides otherwise. Decisions are taken by a simple majority of the members present, as abstention is not permitted, and the Chairperson's vote is decisive. In the event of a lack of consensus, the Commission member voting against the majority justifies the minority opinion, which is published in the Albanian Competition Authority's Official Bulletin alongside the final decision.

68. The procedural decisions of the Commission aim to facilitate or determine the further procedural course of cases, whereas the decisions on substance lead to the resolution of the subject matter of cases. Some of the main decisions on substance are infringement decisions, commitment decisions, decisions on interim measures and decisions on structural or behavioural remedies. Figure 5 shows the number of decisions imposing fines. The total amount of sanctions imposed was over lek 1 billion (over $9 million).

Figure 5
**Albanian Competition Authority decisions, 2004–2013**




## 5.6 Specific rules on notification proceedings

69. The Albanian Competition Authority is empowered to open notification proceedings when dealing with either requests for individual exemption from agreements or requests for authorization of transactions that would concentrate economic activity.

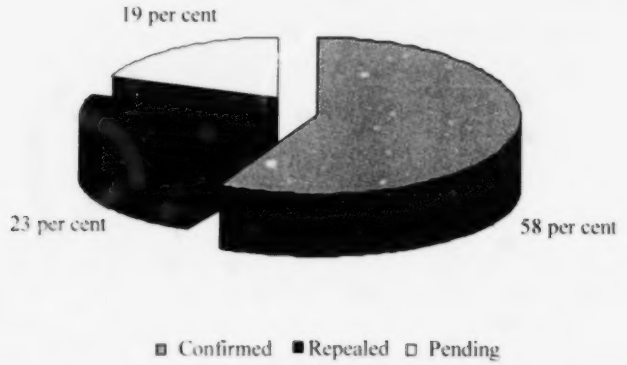
70. The Commission has exclusive authority to decide upon notifications of agreements for granting individual exemptions. A notification submitted to the Authority must contain a detailed description of the scope, content and object of the agreement and the relevant market and market shares of the participant therein, as well as the grounds for granting the individual exemption. Following an assessment, an individual exemption is granted by Commission decision and enters into force from the date of the notification's completion. A temporary exemption may also be granted under certain conditions. It is limited in time but upon request may be extended by the Commission, provided that the requirements of the Act are still met by the parties.

71. However, for concentration notifications, the case first passes through a preliminary assessment, to identify any indicators of significant competition impediments (first phase). The burden of proof that the concentration complies with the appraisal test rests with the notifying party. If the concentration does not show any such indications, the Commission authorizes the concentration within two months from the date of notification. Otherwise, the Commission may authorize the concentration upon conditions or it may open an in-depth assessment. Within three months from the date of initiation of an in-depth assessment, the Commission must decide whether or not to prohibit the concentration (second phase). Prior to taking a decision following an in-depth assessment, the Commission gives the notifying parties, as well as interested third parties related to the notified concentration, the possibility to be heard before the decision-making body.

## 5.7 Judicial review of decisions by the Authority

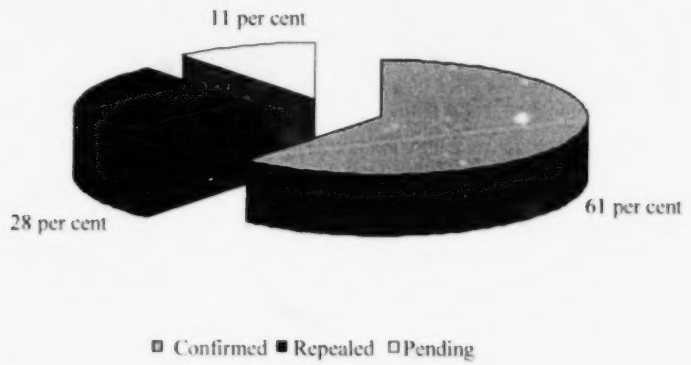
72. According to the Act, the Albanian Competition Authority's decisions are appealable before the District Court in Tirana, which acts as a judicial instance on substance, reviewing both the establishment of the facts and application of the law (figure 6).

Figure 6
**Judicial review of Albanian Competition Authority decisions before District Court, 2005–2012**



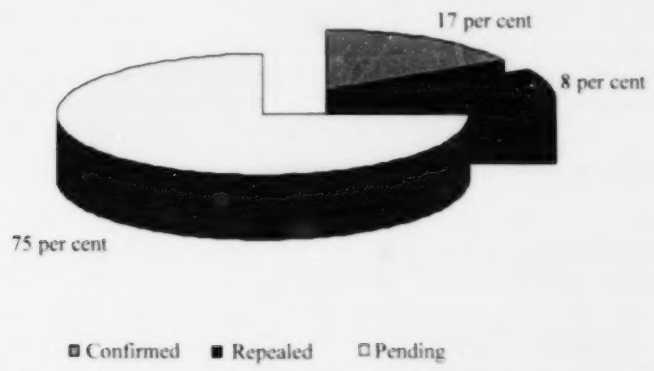

73. The judgements of the District Court are subject to appeal before the Court of Appeal in Tirana (figure 7), whose judgements are subject to final cassation review by the Supreme Court of Albania (figure 8).

Figure 7
**Judicial review of Albanian Competition Authority decisions before Court of Appeal, 2005–2012**




74. Administrative justice reform has recently been carried out, and affects public competition law enforcement in the country. As a result of the reform, the Review Court, which exercises control over the legality of decisions of the Albanian Competition Authority, has been changed and the District Court has been replaced by the newly established Administrative Court in Tirana, which is tasked to review any decision of the Authority adopted after November 2013.

Figure 8
**Judicial review of Albanian Competition Authority decisions before Supreme Court of Albania, 2005–2012**




75. Judgements of the Administrative Court are subject to further judicial review by the Administrative Court of Appeal, the only court of its kind in Albania, also based in Tirana. Its judgements and rulings may be appealed before the Supreme Court of Albania, where a special administrative chamber functions as the last cassation instance on administrative cases.

### 5.8 Civil proceedings on private competition enforcement

76. In addition to public enforcement of competition rules, the Act explicitly provides for the right of any natural or legal person to seek civil protection before the District Court in Tirana of subjective rights affected by competition law infringements by asking for the removal or prevention of the practices restricting competition and reparation or compensation from damages caused by these practices, in accordance with the Civil Code.[34] The action may be undertaken despite the existence of proceedings before the Albanian Competition Authority or prior decisions thereof on the same subject matter.

77. Despite the existing legal framework, there have been no cases of private litigation in Albania to date, mainly due to the lack of public awareness of the possibility for civil protection against competition infringements, the lack of credibility of the judiciary, the length of civil court proceedings and the lack of procedural instruments for private parties to easily obtain evidence for antitrust infringements.

## VI. Sanctioning policy

78. The Act provides for sanctions for both substantive competition law infringements and procedural infringements. The Albanian Competition Authority's sanctioning policy has both punitive effects for infringers and deterrent effects towards infringers specifically but applicable to all those subject to competition law in general.

[34] Law No. 9121, art. 65.

## 6.1 Sanctions for substantive competition law infringements

79. For substantive infringements of competition, the Act provides for sanctions that may be imposed on undertakings or associations of undertakings, as well as individuals.

80. The Commission may impose sanctions on undertakings or associations of undertakings not exceeding 10 per cent of their aggregate annual turnover in the financial year previous to committing a serious infringement as outlined by the law.

81. Individuals may be subject to a fine of not more than lek 5 million (about $50,000) if they intentionally or negligently carry out or cooperate to carry out actions qualified and sanctioned by the Albanian Competition Authority as competition infringements.

## 6.2 Sanctions for procedural competition law infringements

82. The Commission may impose single procedural fines of up to 1 per cent of the aggregate annual turnover of the undertaking or association of undertakings for a procedural (non-serious) infringement.

83. Periodic penalty payments are intended to compel offenders to fulfil particular obligations, to comply with the decisions of the Albanian Competition Authority to terminate violations or impose measures to restore competition or to facilitate the study itself in the administrative proceedings before the Authority. Therefore, periodic penalty payments of up to 5 per cent of the offender's daily turnover in the previous financial year may be imposed on a daily basis until the termination of the unlawful behaviour.

## 6.3 Method of setting sanctions

84. The method of setting sanctions is provided for in the Act and the Albanian Competition Authority has also issued a special regulation on fines and leniency from fines, which specifies all criteria to be considered when determining sanctions.

85. Basic sanctions are associated with a percentage of the value of sales, depending on the gravity of the infringement, multiplied by the duration of the infringement.

86. In calculating the fine, the Authority considers the circumstances that may lead to an increase (aggravating circumstances) or a decrease (attenuating circumstances) of the basic amount, as determined by the gravity and duration of the infringement.

87. Fines for substantive competition infringements should not exceed the legal maximum prescribed in the Act, i.e. a specific percentage of the infringer's turnover calculated on an annual or daily basis depending on the type of sanction.

## 6.4 Leniency policy

88. Since 2004, the Albanian Competition Authority has adopted a leniency policy with a view to facilitating the detection of prohibited agreements between undertakings, but has not yet received any leniency applications under this programme.[35]

89. Immunity from fines is granted only to the first applicant that reveals a prohibited agreement to the Authority. The undertaking should come forward to cooperate with the

[35] Law No. 9121, art. 77

Authority by providing evidence and information not formerly in the possession of the Authority, enabling it to proceed with the launch of investigation proceedings or establishment of a prohibited agreement between undertakings. If the immunity applicant has acted as a leader in the conduct or initiator or instigator in the launch of the prohibited agreement or its continuation, it is explicitly excluded from the possibility of being granted immunity from fines.

90. An undertaking that notifies of participation in a prohibited agreement but does not meet the criteria for immunity from fines may apply for a reduction in fines. The undertaking must give the Authority information that provides added value to the detection of the illegal conduct. In its final decision on the case, the Commission determines the level of leniency for all applicants sequentially; the reduction in fines is 30 to 50 per cent for the first undertaking, 20 to 30 per cent for the second and 20 per cent for any subsequent undertakings.

### 6.5 Execution of sanctions

91. The sanctions imposed by the decisions of the Albanian Competition Authority become executable in accordance with the Civil Procedure Code after entry into force of the relevant decision. Executions are to be performed by the Judicial Enforcement Service, which is authorized to act on the basis of execution orders issued by the District Court in Tirana. However, most of the fines imposed by the Authority have not yet been collected.

## VII. Sector-related competition policy

92. The Albanian Competition Authority has implemented competition policy in some of the main sectors of the Albanian economy by addressing, through its competition enforcement powers or advocacy interventions, different competition-related concerns in these sectors.

### 7.1 Energy sector

93. The energy market in Albania consists mainly of the electricity market, as there is no centralized heating in the country and the gas supply is still underdeveloped.

94. There is a shortage of electricity generation in Albania and the country imports electricity from abroad. Electricity is generated only by hydropower plants in Albania; the country is overdependent on hydropower and vulnerable to hydrological conditions. Although there is a legal opportunity for the establishment of solar power and wind energy generators, there is no real investment interest in renewable energy sources.

95. With regard to electricity transmission, there is only one power grid operator that acts as a wholesaler of electricity, the State-owned company Albanian Power Corporation, which is a vertically integrated undertaking that operates at both wholesale and generation levels. The lack of unbundling of the two types of operation determines some of the major competition concerns in this market, as well as the low financial liquidity of the entire sector, which has caused significant difficulties at the distribution level.

96. The energy sector regulator exercises ex ante control of the electricity market, including the pricing of electricity supply at both wholesale and retail levels. It is legally obliged to cooperate with the Albanian Competition Authority on the basis of the Energy Act. Additionally, they have concluded a memorandum of understanding allowing them to communicate with each other on any regulatory measure to be undertaken. In this context,

the Authority has issued several recommendations to the energy sector regulator to enhance competition in the electricity market.[36]

## 7.2 Telecommunications sector

97. Albania has transposed the European Union 2003 regulatory framework and established the Electronic and Postal Communications Authority as an independent sector regulator.[37] The Albanian Competition Authority and Electronic and Postal Communications Authority have closely cooperated under a memorandum of understanding.

98. With regard to the postal market, only the State-owned Albanian Post provides universal postal service in the country.

99. In the market for fixed-voice telephone service, only the incumbent, Albtelecom, operates and due to its significant market power has been subject to ex ante regulation. Fixed telephony has a low penetration rate and this has encouraged consumers to use more mobile telephony, such that Albania now has a high mobile penetration rate. In the mobile telephony market, Vodafone holds the largest market share, followed by Albanian Mobile Communications and Eagle. Mobile number portability was introduced in 2011.[38]

100. The Authority recently conducted a sector enquiry into the landline telephony market and initiated an investigation of the mobile telephony retail market.[39] Analysing the market structure and degree of competition in the market segment of prepaid telephony card services in Albania, the Authority established that several service providers operate in this segment and there are adequate conditions for effective competition.

101. The Authority also initiated an investigation into the mobile telephony retail market.[40] It found that Vodafone held a dominant position and applied different prices for call generation and termination within and outside its network. The analysis showed that such price discrimination may be used as a mechanism for market foreclosure and push smaller operators to exit the market. Nevertheless, the Authority concluded that no abuse was committed as Vodafone publicly engaged itself to equalize prices for calls within and outside its network particularly towards other telecommunications operators active on the market.[41]

## 7.3 Banking sector

102. The Albanian Competition Authority and the Central Bank of Albania have cooperated under a memorandum of understanding. The Authority has made several recommendations emphasizing the need for increased transparency in the bank loans market to achieve greater consumer protection.

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[36] Decision No. 159 of 19 November 2010.

[37] Law No. 9918 of 19 May 2008 and Law No. 10132 of 11 May 2009.

[38] Cullen International, 2013, Supply of services in monitoring regulatory and market developments for electronic communications and information society services in enlargement countries 2011–2013, Enlargement countries monitoring report 3.

[39] Decision No. 231 of 5 July 2012.

[40] Decision No. 258 of 21 December 2012.

[41] Decision No. 303 of 16 January 2014.

103. There are 16 licensed commercial banks in Albania, the largest of which holds a market share of about 30 per cent. All commercial banks are members of the Association of Commercial Banks in Albania, although this is not a legal requirement.

104. Furthermore, after some customers expressed concerns, the Authority recently conducted market monitoring on the relations between banks and insurance companies in order to assess their behaviour regarding arrangements for life and collateral insurance of borrowers.[42]

## 7.4 Insurance sector

105. The Albanian Competition Authority and the Financial Supervisory Agency, which is the sector regulator for the insurance market, cooperate actively on the basis of a memorandum of understanding.

106. There are 11 insurers operating in the Albanian insurance market, nine of which are licensed only for property insurance and two of which operate across both markets for property and life insurance. The biggest player in the property insurance market holds a 30 per cent market share in the market segment of civil liability insurance of motorists.

107. In 2012, the Authority sanctioned eight insurers that had increased the premiums for civil liability insurance of motorists on the same date.[43] In the course of the investigation, parallel and unannounced on-the-spot inspections were conducted and one company was fined for opposing the inspection.[44] Ultimately, the Authority decided that the insurers had acted collusively, with the objective of restricting competition by fixing the premiums of the civil liability insurance of motorists.[45]

108. In addition, the Authority recommended that the Financial Supervisory Agency amend the legal framework of civil liability insurance to reduce the minimum period allowed for changing insurance premiums, to implement a bonus-malus system and avoid joint work among insurers' actuaries in calculating risk premiums.[46]

## 7.5 Public procurement and concessions

109. The Albanian Competition Authority closely collaborates with the Public Procurement Agency, especially in the prevention and detection of bid rigging in public procurement. Accordingly, the Authority has issued guidelines on countering bid rigging, and has initiated amendments to the Public Procurement Law by introducing a special ban for economic operators on participating in procurement procedures for a period of one to three years, provided that the Authority has found that they have been involved in bid rigging. Moreover, the Authority has proposed an obligation on contracting authorities to inform the Authority of any indications of prohibited agreements during procurement procedures. The Authority has also recommended that the Public Procurement Agency include a certificate of independent bid determination in the standard tender documents and maintain close cooperation with the Authority, including by preparing joint instructions on

[42] Albanian Competition Authority Annual Report for 2013.
[43] Decision No. 222 of 11 April 2012.
[44] Decision No. 216 of 1 March 2012.
[45] Decision No. 246 of 9 October 2012.
[46] Regulation No. 110 of 28 July 2011 and decision No. 247 of 10 September 2012.

combating bid rigging, a guide on detecting and reducing bid rigging and a brochure on the signs of possible bid rigging.[47]

110. In addition, the Authority has dealt with several cases on bid rigging by imposing interim measures and sanctions on bidders.[48]

111. Furthermore, in 2014, the Authority conducted several evaluations on concession agreements, such as the services of certification of technical tests of vehicles, national lottery, fiscal stamps and concession of the seaport of Durres.[49] The Authority assessed the effects of these concessions and issued recommendations with a view to highlighting some public contracts that were problematic in terms of competition.[50]

## 7.6 Transport sector

112. Albania has made efforts to construct new roads and introduce modern traffic signs, although some roads continue to deteriorate due to inadequate maintenance. All roads are State-owned and managed by the General Roads Directorate, which has been recently transformed into an autonomous agency, the Albanian Roads Authority.[51] The railways in Albania are underdeveloped, with a total length of only 447 km and the single international link providing only freight service. The maritime transport sector in Albania is based on the country's four main seaports, which provide regular ferry services. Currently, there is only one international airport in Albania, from which 15 airlines operate. Airways transport is managed by the Civil Aviation Authority, which has a memorandum of understanding with the Albanian Competition Authority.

113. In the road transport market, the Authority conducted an investigation into the urban passenger transport market in Tirana.[52] Following simultaneous dawn raids, the Authority found that undertakings in the relevant market had agreed to significantly restrict the sales of monthly student tickets.[53] The collusive agreement had taken the form of a decision of the national urban transportation association, which was found to have limited the market independence of urban services providers and thereby affected competition and consumers. The Authority therefore imposed sanctions on all colluders and recommended that the municipality of Tirana conduct a study on the methodology of monthly pass distribution for each operator.[54]

114. In the field of maritime transport, the Authority conducted an enquiry into the market of international maritime shipping of passengers and vehicles in the city of Vlora, but no competition concerns were found.[55]

115. With regard to the air transport sector, the Authority conducted market monitoring to establish the most important competition patterns in the air passenger transport market.[56] In the Authority's opinion, as the airport service market consists of only one operator, Tirana International Airport, and as there are no other competitors, the Civil Aviation

[47] Decision No. 158 of 12 November 2010.
[48] Decision No. 219 of 16 March 2012.
[49] Decision No. 319 of 13 June 2014.
[50] Decision No. 312 of 18 April 2014 and decision No. 337 of 11 November 2014.
[51] European Bank for Reconstruction and Development, 2013.
[52] Decision No. 252 of 26 November 2012.
[53] Decision No. 262 of 14 January 2013.
[54] Albanian Competition Authority Letter No. 349 of 2 October 2013.
[55] Decision No. 218 of 23 February 2012 and decision No. 248 of 11 October 2012.
[56] Albanian Competition Authority Annual Report for 2013.

Authority should exert its influence on the regulation of airport fees by orienting them towards costs, to prevent any price abuses in the market.

### 7.7 Fuels market

116. Due to the high level of sensitivity of Albanian society to any fluctuations in diesel and petrol prices, the fuels markets have been regularly monitored by the Albanian Competition Authority in recent years.[57] As a result, the Authority has found that the fuel (petrol and diesel) import market is relatively concentrated, but none of the market participants can behave independently from competitors and customers. None of the three major undertakings in the market holds a dominant position, within an oligopolistic market structure.

117. In addition, the Authority conducted investigations into a possible abuse of dominant position by the port operator providing liquefied petroleum gas loading and unloading services in Romano Port, situated near the seaport of Durres. The dominant firm had repeatedly and unjustifiably refused to unload liquefied petroleum gas for some of the operators that had invested in storage capacity. Therefore, the Authority imposed a fine on Romano Port of lek 6.7 million (about $61,500).[58] In the following years, the Authority has continuously monitored the conditions in the liquefied petroleum gas market, with a view to establishing any further distortions of competition resulting from the dominant player's behaviour.[59]

## VIII. Findings and recommendations

118. Albania has a modern legal and institutional framework for competition protection, which is constantly aligning with the latest developments in European Union competition law. National law allows for an effective competition policy with respect to all sectors of the economy. Success in this regard depends primarily on the continuous efforts of the Albanian Competition Authority to increase the competition culture of economic operators in the country and to assist national policymakers in refraining from taking any measures that may have adverse effects on competition. The involvement of the Authority in regulatory reforms and the implementation of competition advocacy by providing numerous recommendations to sector regulators undoubtedly have beneficial effects on the functioning of the relevant markets. Fighting cartels is a challenge that requires both improving the national leniency policy and increasing coordination with partner-State authorities with regard to actions against bid rigging in public procurement. In general, improving the administrative capacity and continuous training of the Authority's staff are essential for the effective implementation of national competition policy.

119. Recommendations for issues that need to be addressed or improved are as follows, with the entity addressed in parentheses:

(a) Continue to align the national competition framework with European Union standards in competition policy (Government, Albanian Competition Authority and legislature)

(b) Create institutional capacity for effective State aid control (Government and legislature)

[57] Albanian Competition Authority Annual Report for 2012.
[58] Decision No. 221 of 11 April 2012.
[59] Decision No. 277 of 3 April 2013 and decision No. 289 of 4 July 2013.

(c) Increase the effectiveness of consumer protection (Government and legislature)

(d) Reduce the criteria for election of competition authority members (legislature)

(e) Continue safeguarding the independence of the Albanian Competition Authority (Government, Albanian Competition Authority and legislature)

(f) Consider abolishing the notification regime for agreements between undertakings (Albanian Competition Authority and legislature)

(g) Increase public awareness of anti-cartel policy (Parliament and Albanian Competition Authority)

(h) Enhance the leniency policy in cartel cases (Parliament and Albanian Competition Authority)

(i) Fight against bid rigging by coordinating actions with the relevant authorities for public procurement and anti-corruption policies (Albanian Competition Authority, Public Procurement Agency and anti-corruption authorities)

(j) Continue strengthening tools for competition advocacy (Albanian Competition Authority, legislature and policymakers)

(k) Enhance the competition culture of economic operators in Albania (Albanian Competition Authority)

(l) Introduce detailed rules on commitment decisions (Albanian Competition Authority and legislature)

(m) Increase public awareness of private competition enforcement (Government, judiciary and Albanian Competition Authority)

(n) Strengthen capabilities to conduct on-the-spot inspections in competition cases (Albanian Competition Authority)

(o) Institute the function of Chief Economist to facilitate the use of economic analysis in competition cases (Albanian Competition Authority)

(p) Establish workable systems for the execution of sanctions imposed by the Albanian Competition Authority (Government, judiciary and legislature)

(q) Introduce a precise system for career planning and extra incentives for the staff of the Albanian Competition Authority (Albanian Competition Authority)

(r) Continue to seek technical assistance and training activities for the staff of the Albanian Competition Authority (Albanian Competition Authority)

(s) Provide training activities for judges on competition law (Government, judiciary and Albanian Competition Authority)

(t) Institute a library in the Albanian Competition Authority (Albanian Competition Authority).

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Geneva, 6–10 July 2015
Item 6 (b) of the provisional agenda
**Consideration of proposals for the improvement and further development of the Set, including international cooperation in the field of control of restrictive business practices**

# Voluntary Peer Review of Competition Law and Policy:

# Albania

## Overview*

**Corrigendum**

**Paragraph 3, last sentence**

1900s *should read* 1990s

* This document is an overview of the voluntary peer review of competition law and policy in Albania (UNCTAD/DITC/CLP/2015/1).

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